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No. 10- 10-397

FILED

SEP 19 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HEATHCLIFFE JOHN BRADLEY,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, a citizen of New Zealand who entered the United States under the Visa Waiver Program ("VWP"), applied for lawful permanent residence as an immediate relative spouse of an American citizen before any action to remove him had been taken. Pursuant to 8 U.S.C. § 1187(b), a VWP entrant must waive the right to contest any action for removal on any basis other than asylum. However, 8 U.S.C. § 1255(c)(4) permits a VWP entrant who is an immediate relative of an American citizen to adjust status and 8 U.S.C. § 1255(c)(2) allows an immediate relative to adjust despite certain status violations, including the failure to maintain lawful status. Since 2006, seven Courts of Appeals have ruled that an immediate relative VWP entrant may only adjust status during the first ninety days after entry while the entrant maintains legal status. Following the Third Circuit's decision below in *Bradley v. Attorney General*, No. 08-4184, 2010 WL 1610597, (3d Cir. Apr. 22, 2010), the Government has halted the adjudication of these applications nationwide, threatening spouses of American citizens with summary removal. Petitioner seeks certiorari to review the following questions:

1. Whether an immediate relative VWP entrant may adjust his status to that of a person admitted for lawful permanent residence despite overstaying the ninety day period allotted for such entrants, so long as the application is filed prior to the initiation of any action to remove him and thus not to contest any action for removal; and

2. Whether the general authority to remove a VWP alien without a hearing pursuant to 8 U.S.C. § 1187(b) permits Petitioner's summary removal without a hearing or right to renew the application before an immigration judge notwithstanding the specific provisions of 8 U.S.C. § 1255(c)(2) and (4), which allow for the adjudication of an application for adjustment of status filed by an immediate relative spouse of an American citizen despite a VWP entry and despite overstay and violation of status?

PARTIES TO THE PROCEEDING

Petitioner is Heathcliffe John Bradley, petitioner below.

Respondent is the Attorney General of the United States, respondent below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	iv
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	vii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
A. The Visa Waiver Program	3
B. Factual Background	4
C. Procedural Background	5
REASONS FOR GRANTING THE PETITION	6

Table of Contents

Page

I. THE THIRD CIRCUIT DECIDED AN IMPORTANT AND FREQUENTLY-RECURRING QUESTION OF FEDERAL IMMIGRATION LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT 7

II. THE THIRD CIRCUIT'S DECISION IS INCORRECT ON THE MERITS ... 10

A. The Third Circuit's Decision Disregards the Plain Language of the Pertinent Statutes 10

B. A Principle Of Statutory Construction States That Specific Provisions Prevail Over General Provisions 13

C. The Third Circuit's Decision Fails To Adhere To The Principle Of Construing Ambiguities In Deportation Statutes In Favor Of The Alien 14

D. The Third Circuit's Decision Creates A Rule That Practically Nullifies The Purported Purpose of 8 U.S.C. § 1255(c)(4) 15

E. The Third Circuit's Decision Is Inconsistent With The Policies Underlying Immigration Laws and the Legislative Intent 18

CONCLUSION 21

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED APRIL 22, 2010 ..... 1a

APPENDIX B — ORDER OF REMOVAL FOR DEPORTATION UNDER SECTION 217 OF THE IMMIGRATION & NATIONALITY ACT DATED OCTOBER 18, 2008 ..... 18a

APPENDIX C — NOTICE OF DECISION DATED JUNE 5, 2008 ..... 20a

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC FILED JUNE 21, 2010 ..... 24a

TABLE OF CITED AUTHORITIES

Page

CASES

Bayo v. Napolitano,
593 F.3d 495 (7th Cir. 2010) 8, 11

Busic v. United States,
446 U.S. 398 (1980) 13

Coady v. Vaughn,
251 F.3d 480 (3d Cir. 2001) 14

Crandal v. Ball, Ball & Brosamer,
99 F.3d 907 (9th Cir. 1996) 17

Edmond v. United States,
520 U.S. 651 (1997) 13

Ferry v. Gonzales,
457 F.3d 1117 (10th Cir. 2006) 7, 8

Fong Haw Tan v. Phelan,
333 U.S. 6 (1948) 15

Freeman v. Gonzales,
444 F.3d 1031 (9th Cir. 2006) ..... *passim*

In re Freeman,
489 F.3d 966 (9th Cir. 2007) 17

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 14-15

Cited Authorities

	Page
INS v. St. Cyr, 533 U.S. 289 (2001)	14
Lacey v. Gonzales, 499 F.3d 514 (6th Cir. 2007)	8
McCarthy v. Mukasey, 555 F.3d 459 (5th Cir. 2009)	8
Momeni v. Chertoff, 521 F.3d 1094 (9th Cir. 2008)	8, 12
Preiser v. Rodriguez, 411 U.S. 475 (1973)	13
Robinson v. Napolitano, 554 F.3d 358 (3d Cir. 2009)	18
Schmitt v. Maurer, 415 F.3d 1092 (10th Cir. 2006)	7
Solis-Espinoza v. Gonzales, 401 F.3d 1090 (9th Cir. 2005)	18
Varity v. Howe, 516 U.S. 489 (1996)	14
Zine v. Mukasey, 517 F.3d 535 (8th Cir. 2008)	8

Cited Authorities

Page

STATUES

8 U.S.C. § 1151(b)(2)(A)(i) 3, 18

8 U.S.C. § 1153(a) 11

8 U.S.C. § 1153(b) 11

8 U.S.C. § 1153(c) 11

8 U.S.C. § 1182(a)(6)(C)(i) 16, 18

8 U.S.C. § 1182(a)(9)(A)(i) 17

8 U.S.C. § 1182(a)(9)(A)(ii) 17

8 U.S.C. § 1182(a)(9)(A)(iii) 17

8 U.S.C. § 1182(i) 18

8 U.S.C. § 1187 3

8 U.S.C. § 1187(b) ..... *passim*

8 U.S.C. § 1187(c)(3)(A) 4

8 U.S.C. § 1229b 11

8 U.S.C. § 1252(a)(1) 5

Cited Authorities

	Page
8 U.S.C. § 1252(a)(2)(D)	5
8 U.S.C. § 1255(a)(2)	16
8 U.S.C. § 1255(c)	2
8 U.S.C. § 1255(c)(2)	*passim*
8 U.S.C. § 1255(c)(4)	*passim*
28 U.S.C. § 1254(1)	1
42 U.S.C. § 1983	14
OTHER REFERENCED MATERIAL	
8 C.F.R. § 103	20
8 C.F.R. § 245.2	12
8 C.F.R. § 245.2(a)(5)	7, 13
8 C.F.R. § 217.2(b)	3
8 C.F.R. § 217.2(b)(1)	3
H.R.Rep. No. 89-745 at 1, 12 (1965)	18
H.R.Rep. No. 1199, 85th Cong., 1st Sess., 7 (1957), U.S. Code Cong. & Admin. News 1957, p. 202	19

Cited Authorities

	Page
1 FAM 011.1(a)	16
9 FAM 40.63 n.4.7-2	16
9 FAM 40.63 n.4.7-3	16
9 FAM 40.63 n.4.7-4	16
Act to Amend the Immigration and Nationality Act, Pub.L. 89-236, § 1, 79 Stat. at 911	18
78 *Interpreter Releases* 794 (May 7, 2001)	19
Immigration & Nationality Law Handbook 873 (2009-10 ed.)	9
Nina Bernstein, *Strict Reading of Visa Rule Trips Up More Couples*, N.Y. Times, May 14, 2010	9
Visa Waiver Pilot Program, 53 Fed. Reg. 24,898, 24,898 (June 30, 1988)	3
Waiver of Nonimmigrant Visa Requirements: Hearing Before the Subcomm. On Immigration, Refugees, and International Law of the H. Comm. on the Judiciary, 96th Cong. 1-2 (1980)	20

Cited Authorities

Page

The Math of Immigration Detention, National Immigration Forum, July 7, 2009, http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf (citing Michelle Roberts, *Immigrants Face Lengthy Detention with Few Rights*) 20

"Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule," 72 Fed. Reg. 4888, (Feb. 1, 2007) 20

The Electronic System for Travel Authorization: Mandatory Compliance Required for Travel Under the Visa Waiver Program, 73 Fed. Reg. 67,354 (Nov. 13, 2008) 3

PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals on petition for review (App. A, *infra*) is reported at __ F.3d __, 2010 WL 1610597 (3d Cir. April 22, 2010). The decision of the Court of Appeals denying a rehearing by panel and *en banc* (App. D, *infra*), is unreported.

JURISDICTION

The judgment of the court of appeals denying the petition for review was entered on April 22, 2010. App., *infra*, 1a. The judgment of the court of appeals denying a rehearing by panel and *en banc* was entered on June 21, 2010. App., *infra*, 25a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

8 U.S.C. § 1187(b)

An alien may not be provided a waiver under the program unless the alien has waived any right –

(1) to review or appeal under this Act of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or

(2) to contest, other than on the basis of an application for asylum, any action for removal of the alien.

8 U.S.C. § 1255(c)

Other than an alien having an approved petition for classification as a VAWA self-petitioner, subsection (a) [regarding eligibility for adjustment of status] shall not be applicable to –

***

(2) . . . an alien (other than an immediate relative . . . who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States; [or]

***

(4) an alien (other than an immediate relative as defined in section 201(b)) who was admitted as a nonimmigrant visitor without a visa under . . . section 217.

STATEMENT OF THE CASE

This case involves the Government's efforts to remove Petitioner, Heathcliffe John Bradley, a citizen of New Zealand married to an American citizen, from

the United States without a hearing in accordance with the provisions of the Visa Waiver Program ("VWP"), as set forth at 8 U.S.C. § 1187. Petitioner maintains that as an "immediate relative" (defined at 8 U.S.C. § 1151(b)(2)(A)(i) to include the spouse of an American citizen), he is eligible to adjust his status despite overstaying the ninety-day time period allotted by the VWP pursuant to 8 U.S.C. § 1255(c)(2) and (4).

A. The Visa Waiver Program

Established in 1986, the Visa Waiver Pilot Program ("VWPP") – now the VWP – was established "to determine if a visa waiver provision could facilitate international travel and promote the more effective use of the resources of affected government agencies . . ." Visa Waiver Pilot Program, 53 Fed. Reg. 24,898, 24,898 (June 30, 1988). The VWP now permits eligible nationals of thirty-six designated countries, including New Zealand, to enter the United States without a visa for a ninety-day period for the purpose of tourism or business. *See* 8 U.S.C. § 1187; 8 C.F.R. § 217.2(b). However, a VWP entrant is statutorily required to waive any right to contest any action for removal, except on the basis of asylum, by executing a Form I-94W upon arrival.[1] 8 U.S.C. § 1187(b); 8 C.F.R. § 217.2(b)(1). The integrity of the program is preserved because the

1. Under the Electronic System for Travel Authorization ("ESTA"), potential VWP entrants are now required to complete the Form I-94W online and receive travel authorization prior to traveling to the United States. *See* The Electronic System for Travel Authorization: Mandatory Compliance Required for Travel Under the Visa Waiver Program, 73 Fed. Reg. 67,354 (Nov. 13, 2008).

number of overstays is limited by 8 U.S.C. § 1187(c)(3)(A), which provides that a VWP designated country will not receive redesignation if the total number of nationals of that country who were admitted as non-immigrant visitors during the previous fiscal year and who violated the terms of admission exceeds two percent of the total number of nationals of that country who applied for admission as non-immigrant visitors during the previous fiscal year.

B. Factual Background

Petitioner, Heathcliffe John Bradley, a native and citizen of New Zealand, was inspected and admitted into the United States on August 28, 1996 without a valid non-immigrant visa pursuant to the VWP, although the Government has been unable to produce Petitioner's signed Form I-94W evidencing a waiver. Pet. App. A at 3a-4a.

On July 29, 2006, Petitioner married an American citizen, Cheryl Losee. *Id.* at 4a. Petitioner thereafter sought an adjustment of status to that of a lawful permanent resident based on his marriage. *Id.* at 4a-5a. However, after his request to reschedule his adjustment interview with United States Citizenship and Immigration Services ("USCIS") was denied, so too was his adjustment application without any consideration on the merits. *Id.* at 5a or Pet. App. C at 20a-23a. On October 8, 2008, the Government detained Petitioner for thirty-seven days and ordered him removed without a hearing from the United States. *Id.* at 5a or Pet. App. B at 19a. Petitioner filed a Petition

for Review in the United States Court of Appeals for the Third Circuit. *Id.* at 5a.

C. Procedural Background

Because VWP entrants must waive any right to contest any action for removal, other than on the basis of asylum, Petitioner's only recourse was to challenge the constitutionality of his summary removal order by petitioning the United States Court of Appeals for the Third Circuit for review pursuant to 8 U.S.C. § 1252(a)(1) and (a)(2)(D).

On April 22, 2010, the Third Circuit denied Petitioner's Petition for Review. In its decision, the Court first presumed that Petitioner had completed and signed a Form I-94W on entry, relying on the unsigned portion of an I-94W form, Petitioner's admittedly "vague" statement that he may have completed some form on arrival, and the presumption of regularity. Pet. App. A at 8a. Next, the Court decided that even if the waiver was not executed knowingly and voluntarily, Petitioner could not establish substantial prejudice arising out of his alleged due process violation – apparently his unknowing waiver of constitutional rights. *Id.* at 9a-10a-14a. Finally, the Court held that a VWP entrant "may not, after the expiration of his 90-day stay, adjust his status as a defense to removal." *Id.* at 16a. The Court's decision to limit VWP entrant adjustments to the first ninety days brought the Third Circuit in line with six other federal Courts of Appeals.

Petitioner's Petition for Rehearing by Panel and *En Banc* was summarily denied on June 21, 2010.

REASONS FOR GRANTING THE PETITION

Despite the fairly recent trend set by seven Courts of Appeals in deciding this issue over the course of the last four years, the Government has largely adhered to its longstanding and completely different policy of adjudicating the adjustment applications of immediate relative VWP overstays. This policy, however, has been inconsistently applied nationwide, leading to considerable confusion and the occasional, seemingly random removal of VWP entrants, despite only the most minimal status violations and despite their status as spouses of American citizens. When a VWP overstay is removed, several bars to reentering the United States are automatically triggered subjecting them to upwards of fifteen years of inadmissibility.

The Third Circuit, and six other Courts of Appeals, would limit the statutory eligibility of applying for an adjustment of status to immediate relative VWP entrants *only* within the first ninety days after entry. This rule is based on a misinterpretation of the plain language of the pertinent statutes and a disregard for the principles of statutory construction, the family unity policy underlying immigration laws, and the legislative intent. We maintain that the three relevant provisions – 8 U.S.C. §§ 1187(b) and 1255(c)(2) and (4) – are properly read together to afford an immediate relative VWP entrant the ability to seek adjustment, regardless of certain status violations and the date of the filing, as long as the application pre-dates any action for removal.

Where an application has been denied after an action for removal has been initiated, the applicant should retain certain procedural protections, including the right to renew his application before an immigration judge in accordance with 8 C.F.R. § 245.2(a)(5).

I. THE THIRD CIRCUIT DECIDED AN IMPORTANT AND FREQUENTLY-RECURRING QUESTION OF FEDERAL IMMIGRATION LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT

In recent years, the questions presented by this case have recurred with increased frequency owing to the Government's inconsistent application of its own policy as well as judicial precedents when adjudicating immediate relative VWP overstay adjustment applications. Throughout the twenty-four year history of the VWPP and VWP, the vast majority of immediate relative VWP entrant adjustment applicants have been granted adjustments of status. However, USCIS has occasionally refused to adjudicate certain applications and many American citizens and their VWP entrant spouses have faced the breakup of their families in recent years as a result. Eight immediate relative VWP entrant adjustment cases, including Petitioner's, have been decided in the United States Courts of Appeals since 2006. *See Schmitt v. Maurer*, 415 F.3d 1092, 1097 (10th Cir. 2006) (holding that "[t]he statutes authorize two different results only when an alien overstays his visa *and is ordered removed before* the alien files a petition for adjustment of status) (emphasis added); *Ferry v. Gonzales*, 457 F.3d 1117, 1127-28 (10th Cir. 2006)

(holding that a VWP entrant who overstays, attempts to adjust status, and is ordered removed, has waived the right to contest the removal order through a renewed application, although the VWP entrant here was also removable on other grounds); *Lacey v. Gonzales*, 499 F.3d 514, 519 (6th Cir. 2007) (same); *Zine v. Mukasey*, 517 F.3d 535, 543 (8th Cir. 2008) (agreeing with *Ferry* and *Lacey* where VWP entrant was a citizen of a non-VWP country who entered with a fraudulent passport); *Momeni v. Chertoff*, 521 F.3d 1094 (9th Cir. 2008) (limiting the Ninth Circuit's previous decision in *Freeman v. Gonzales*, 444 F.3d 1031, 1095 (9th Cir. 2006), which permitted a VWP entrant to adjust, to apply only during the first ninety days); *McCarthy v. Mukasey*, 555 F.3d 459, 461-62 (5th Cir. 2009) (joining other Circuits); *Bayo v. Napolitano*, 593 F.3d 495 (7th Cir. 2010) (*en banc*) (same, in another case of a non-citizen VWP entrant who entered using a fraudulent passport). The increase in recent litigation strongly suggests that the Government's unpredictability has become problematic and that the issue is frequently recurring.

The Courts of Appeals, which began issuing decisions on the questions presented more than four years ago, have largely agreed on the ninety-day limitation on immediate relative VWP entrant adjustments of status. *Id.* For more than four years, however, USCIS has largely, though inconsistently, continued its policy of adjudicating and granting such applications. Adjudications continued in the Ninth Circuit even after the ninety-day limitation was imposed by the troubling *Momeni* decision in 2008. In Las Vegas, for example, United States Immigration and Customs Enforcement ("ICE") agreed to wait for USCIS to

adjudicate an adjustment application and only sought removal if the application was denied for reasons unrelated to the VWP entrance. *See* M. Mercedes Badia-Tavas, Melissa Harms, and Leslie Jewell, Momeni v. Chertoff *and Related Case Law: Can Visa Waiver Clients Still Marry and Adjust?*, Immigration & Nationality Law Handbook 873 (2009-10 ed.). In Sacramento and Los Angeles, USCIS district offices continued to adjudicate adjustment applications filed outside the ninety-day period. *Id.* The procedure was reportedly similar in the Sixth Circuit field offices in Ohio and Michigan, as well as in the Seventh Circuit Chicago field office. *Id.*

Most recently, following the *Bradley* decision, USCIS has apparently halted the adjudication of adjustment applications, leaving large numbers of American citizens and their non-citizen family members in limbo. *See, e.g.*, Nina Bernstein, *Strict Reading of Visa Rule Trips Up More Couples*, N.Y. Times, May 14, 2010. ("Until now, even in states in other circuits that have issued similar rulings, immigration authorities have generally used the more-lenient law and their discretion to approve such cases, rather than order deportation, immigration lawyers say.") Lawyers claim that there are "thousands of couples who could be adversely affected by the [*Bradley*] decision..." *Id.* Yet despite the apparent freeze on adjudications, the Government's inconsistent practices continue. In the post-*Bradley* Third Circuit, an adjustment of status was approved in the high-profile case of dual German and British citizen Karsten Van Sander.

For several years, the Government has largely disregarded the fairly consistent opinions of seven Courts of Appeals, perhaps because it perceives the Courts' rule as incorrect, and has continued to adjudicate the adjustment applications of immediate relative VWP overstays. Periodically, however, the Government refuses to adjudicate an application, seemingly at random. The Government's inconsistent practices continue to jeopardize the marriages of thousands of American citizens and their VWP entrant spouses nationwide, who are merely seeking to legalize their status after extremely minor violations of immigration law. Because the issue has remained unresolved despite the intervention of seven Courts of Appeals and despite a period of uncertainty lasting for more than four years, the questions presented are nationally important, frequently-recurring, and in need of the attention of this Court.

II. THE THIRD CIRCUIT'S DECISION IS INCORRECT ON THE MERITS

A. The Third Circuit's Decision Disregards the Plain Language of the Pertinent Statutes

The VWP statute states that an alien must waive any right "to contest, other than on the basis of an application for asylum, any action for removal of the alien." 8 U.S.C. § 1187(b). Taken together with 8 U.S.C. § 1255(c)(4), which expressly permits immediate relative VWP entrants to seek adjustment, and *completely disregarding* 8 U.S.C. § 1255(c)(2), which allows immediate relative aliens to seek adjustment despite

certain status violations, the Third Circuit below ruled that Petitioner "may not, after the expiration of his ninety-day stay, adjust his status as a defense to removal." Pet. App. 16a at 18. The Court incorporated the Seventh Circuit's reasoning in *Bayo*, which suggests that an application submitted within the first ninety days of a VWP entrant's stay would not represent an objection to removal while an application submitted thereafter would constitute a challenge to removal. 593 F.3d at 507. But the plain language of the statute imposes no such ninety-day limitation on VWP entrants, and if Congress had intended such a result, it could have easily expressed this desire. Instead, a straightforward reading of the language produces a more plausible rule.

With respect to 8 U.S.C. § 1187(b), Petitioner's adjustment application did not represent an attempt "to contest . . . any action for removal." In certain circumstances, such as in the pursuit of an adjustment of status application in conjunction with cancellation of removal pursuant to 8 U.S.C. § 1229b, an adjustment application would constitute a challenge to removal. In other situations, an adjustment of status can be achieved without the existence of removal proceedings, such as through diversity immigrant visas, *see* 8 U.S.C. § 1153(c), employment-based immigrant visas, *see* 8 U.S.C. § 1153(b), and family-based immigrant visas, *see* 8 U.S.C. § 1153(a). In the latter cases, an adjustment of status acts as a procedural mechanism that permits individuals to obtain immigrant status without the inconvenience of having to depart from the U.S. and begin processing abroad. Petitioner's application for adjustment belongs in the latter category, as he proactively filed for an adjustment based on his immediate relative status

before any attempts to remove him began. In short, Petitioner's application cannot be considered a *challenge to removal* because at the time it was filed no action for removal existed.

Given that Petitioner's waiver of rights did not become operational when he filed his adjustment application, his situation should be governed instead by 8 U.S.C. § 1255(c)(4), which permits immediate relative VWP entrants to seek adjustment, and (c)(2), which expressly grants an immediate relative alien the right to seek adjustment, despite accepting unauthorized employment and *despite failing to maintain continuously a lawful status since entry*. Read together, the three provisions plainly suggest that an immediate relative VWP overstay is *statutorily eligible* to seek adjustment, regardless of certain status violations and the date of the filing, as long as the application *pre-dates* any action for removal. Thus, Petitioner, who proactively filed an application prior to the issuance of an order of removal against him, should be eligible for adjustment despite his status violations.

Prior to aligning itself with the numerous Courts of Appeals, which had adopted the ninety-day limitation, the Ninth Circuit in *Freeman* offered a workable extension to the plain language rule proposed by Petitioner: "[O]nce a VWP entrant files an adjustment of status application as an immediate relative, as contemplated by 8 U.S.C. § 1255(c)(4), the alien is entitled to the procedural guarantees of the adjustment of status regime, *see* 8 C.F.R. § 245.2, and to that extent is no longer subject to the Visa Waiver Program's no-contest clause." 444 F.3d at 1033 (limited by *Momeni*, a

short decision that failed to account for 8 U.S.C. § 1255(2)(c), proclaiming that immediate relatives who entered under VWP can *only* adjust within the first ninety days while in *valid status*). The *Freeman* Court, in an exhaustive and well reasoned decision, correctly suggested that an adjustment applicant retains the right to renew his application if it has been denied pursuant to 8 C.F.R. § 245.2(a)(5), and if a renewal occurs after an action for removal has been initiated, an immigration judge rather than a district director should review and rule on the application. *Id.* at 1035. Under this rule, after Petitioner's initial application was denied and the Government sought to remove him, his reapplication should have qualified him for the procedural guarantees set forth in the Code of Federal Regulations and described by the *Freeman* Court.

B. A Principle Of Statutory Construction States That Specific Provisions Prevail Over General Provisions

It is a well-established canon of statutory interpretation that where two provisions appear to conflict, the particular provision should prevail over the general provision. *See Edmond v. United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs."); *Busic v. United States*, 446 U.S. 398, 406 (1980) (discussing "the principle that a more specific statute will be given precedence over a more general one"); *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973) (holding that Congress' specific determination that habeas corpus is the appropriate remedy for state prisoners attacking the validity of their confinement

must prevail over the general terms of 42 U.S.C. § 1983). "The rationale for this canon is that a general provision should not be applied 'when doing so would undermine limitations created by a more specific provision.'" *Coady v. Vaughn*, 251 F.3d 480, 484 (3d Cir. 2001) (citing *Varity v. Howe*, 516 U.S. 489, 511 (1996)).

When Congress enacted the VWP, it created a general prohibition preventing VWP entrants from challenging removal on any basis other than asylum. *See* 8 U.S.C. § 1187(b). However, Congress also expressly indicated that VWP entrants who are immediate relatives are permitted to adjust their status without restriction. 8 U.S.C. § 1255(c)(4). Specifically, Congress carved out an exception for immediate relatives permitting these special class of immigrants from favorite nations to adjust their status despite minor immigration violations including accepting unauthorized employment and failing to maintain lawful status since entry. 8 U.S.C. § 1255(c)(2). If the above provisions are read to present a conflict, the latter provisions, dealing with the specific plight of immediate relatives of American citizens, should accordingly prevail over the general ban on challenges to removal.

C. The Third Circuit's Decision Fails To Adhere To The Principle Of Construing Ambiguities In Deportation Statutes In Favor Of The Alien

In immigration law, there is a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-*

Fonseca, 480 U.S. 421, 449 (1987)). Just as ambiguities should be interpreted in favor of the accused in the criminal context, ambiguities, if they exist, in the deportation context should be interpreted in favor of the alien. The principle reflects the understanding that "[d]eportation is always a harsh measure." *Cardoza-Fonseca*, 480 U.S. at 449; *see also Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("We resolve the doubts in favor of that construction before deportation is a drastic measure and at times the equivalent of banishment of exile. It is in the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.") As this case directly involves the interpretation of a deportation statute, specifically the summary removal provisions of 8 U.S.C. § 1187(b), the rule of lenity is applicable and should resolve any potential ambiguities in favor of the alien.

A rule that permits an adjustment application filed by an immediate relative VWP entrant to be adjudicated as long as it was filed before any action for removal has been initiated and without regard to whether it was filed within ninety days of the VWP entry would be in keeping with the spirit of the rule of lenity.

D. The Third Circuit's Decision Creates A Rule That Practically Nullifies The Purported Purpose of 8 U.S.C. § 1255(c)(4)

In practice, the rule announced by the Third Circuit defies logic. A rule permitting immediate relative VWP entrants to adjust only during the first ninety days fails to recognize that anyone attempting to adjust so soon after arriving in the United States likely entered with

impermissible immigrant intent in violation of 8 U.S.C. § 1182(a)(6)(C)(i), which provides that any alien who willfully misrepresents a material fact in procuring admission to the United States is inadmissible. Any alien who is deemed inadmissible is also ineligible for an adjustment of status. *See* 8 U.S.C. § 1255(a)(2).

While it does not have the force of law, the Foreign Affairs Manual ("FAM"), which sets forth the basic organizational directive of the Department of State, *see* 1 FAM 011.1(a), provides some insight into the Government's policies on misrepresentation. The FAM states that if an alien marries and seeks an adjustment of status within thirty days of entry, Government officials may presume that the applicant misrepresented his or her intention in seeking entry into the United States in violation of 8 U.S.C. § 1182(a)(6)(C)(i). *See* 9 FAM 40.63 n.4.7-2. If an alien seeks an adjustment of status between thirty and sixty days after entry, the alien's intent may still be scrutinized for misrepresentation. *See* 9 FAM 40.63 n.4.7-3. Only an alien who marries between sixty and ninety days following entry will not be subject to inquiry. *See* 9 FAM 40.63 n.4.7-4.

The issue of impermissible intent at the time of entry has also been problematic in the only VWP entrant case we were able to discover in which the applicant was deemed eligible to adjust. In *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), the Ninth Circuit permitted an alien who filed within the ninety day period to seek an adjustment of status. On remand, however, the Court held that the alien, who was married to a U.S. citizen at the time of her VWP entry, had entered with non-immigrant intent and thereby misused the VWP. *In re*

Freeman, 489 F.3d 966, 969 (9th Cir. 2007). The alien's adjustment application was ultimately denied. *Id.* In practice, therefore, the Third Circuit's ruling comes close to nullifying what the Court purports is the function and purpose of 8 U.S.C. § 1255(c)(4).

Furthermore, the Third Circuit's ruling is illogical in that it requires the summary removal of immediate relative VWP overstays while 8 U.S.C. § 1255(c)(2) apparently permits all other immediate relatives with certain violations of status to apply for adjustment. As the Ninth Circuit stated in *Freeman*, "having granted VWP visitors the right to seek an adjustment of status, it makes no sense for Congress to have intended that these preferred visitors – by definition, citizens of certain favored countries – should have second-class status once they enter into the adjustment of status process." 444 F.3d at 1035 (referencing *Crandal v. Ball, Ball & Brosamer*, 99 F.3d 907, 910 (9th Cir. 1996) ("A statute should be read in a manner which attribute[s] a rational purpose to the legislature.")) Among the sever consequences of the decision is the fact that Petitioner becomes subject to a host of periods of inadmissibility including a a five year bar from reentering for being removed from the United States under 8 U.S.C. §§ 1182(a)(9)(A)(i) and (ii).[2]

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2. Although the five year inadmissibility bar for being removed from the United States may be waived by the Attorney General or USCIS under 8 U.S.C. §1182(a)(9)(A)(iii), the Petitioner and his American spouse will be separated for months, if not years, waiting outside of the United States for the issuance of the immigrant visa and grant of the waiver. This undermines the legislative intent and design to *specifically* allow immediate relatives (spouses of American citizens) to adjust their status in the United States notwithstanding their entry under the VWP or for that matter, failure to maintain legal status under 8 U.S.C. §§ 1255(c)(2) and (4).

Most VWP entrants, like Petitioner, are non-criminals from "favored countries" who entered the United States legally, yet the Third Circuit's ruling would make it more difficult for such individuals to remain in the United States with their American citizen spouses than certain aliens who entered the United States illegally. For example, aliens who, by fraud or willful misrepresentation of a material fact, procure a visa or other documentation to enter the United States, enjoy more procedural rights than a VWP entrant. *See* 8 U.S.C. § 1182(i)(waiver available *in* the United States for violation of 8 U.S.C. § 1182(a)(6)(C)(i)).

E. The Third Circuit's Decision Is Inconsistent With The Policies Underlying Immigration Laws and the Legislative Intent

One of the primary goals of American immigration law policy is family unity. *See, e.g., Robinson v. Napolitano*, 554 F.3d 358, 367 (3d Cir. 2009) ("[T]he core purpose of the U.S. family-based immigration policy [is] the promotion of family unification for U.S. citizens and lawful permanent residents." *Id.* (referencing Act to Amend the Immigration and Nationality Act, Pub.L. 89-236, § 1, 79 Stat. at 911 (codified as amended at 8 U.S.C. § 1151(b)(2)(A)(i); H.R.Rep. No. 89-745 at 1, 12 (1965)); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) ("Public policy supports recognition and maintenance of a family unit. The [INA] was intended to keep families together. It should be construed in favor of family units . . ."). Congress has expressly granted U.S. citizens the right to petition for their spouses and

children, excluding most hardships that may arise from the immigration laws. H.R.Rep. No. 1199, 85th Cong., 1st Sess., 7 (1957), U.S. Code Cong. & Admin. News 1957, p.202. Even former President Bush himself, who, in urging an extension of remedial immigration legislation, explained that, "I am a strong proponent of government policies that recognize the importance of families and that help to strengthen them. To the extent possible, I believe that our immigration policies should reflect that philosophy." 78 *Interpreter Releases* 794 (May 7, 2001).

In holding that an immediate relative VWP entrant who overstays cannot adjust his status, the Third Circuit has disregarded the family unity policy underlying America's immigration laws and threatens to break up the families formed by American citizens and citizens of "favored countries" simply because the latter has overstayed *even for one day.* This result is unconscionable and simply ignores the foundation on which America's immigration policy is built on – family unification. As discussed above, in most situations, the family unity policy permits an immediate relative of an American citizen to remain with his family in the United States, despite certain minor status violations. *See* 8 U.S.C. § 1255(c)(2). The Third Circuit has offered no explanation as to why this policy does not compel a more favorable reading of 8 U.S.C. §§ 1187(b) and 1255(c)(2) and (4).

Among the specific goals of the VWP was to produce "cost savings for the Department of State which could reduce its staff overseas" from friendly nations, where visa fraud is almost non-existent, and transfer consulate officials to more problematic posts around the world.

Waiver of Nonimmigrant Visa Requirements: Hearing Before the Subcomm. On Immigration, Refugees, and International Law of the H. Comm. on the Judiciary, 96th Cong. 1-2 (1980) (statement of Rep. Holtzman, Chairwoman, House Subcomm. on Immigration, Refugees, and International Law). Yet prohibiting immediate relative VWP overstays from adjusting fails, at a minimum, to further the goal of cost savings. American taxpayers fund the cost of a removed alien's flight to the country of removal as well as any costs of detention, which run approximately $141 per night. *See The Math of Immigration Detention*, National Immigration Forum, July 7, 2009, http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf (citing Michelle Roberts, *Immigrants Face Lengthy Detention with Few Rights*) (statistics based on the amount budgeted for the 2009 fiscal year).

Here, the taxpayers have already paid a total of approximately $5,217 to detain Petitioner for thirty-seven nights and could yet fund the cost of his return ticket to his native New Zealand. Conversely, the cost of reviewing and granting an adjustment petition is covered by the applicant and does allow for cost savings. (The fee for submitting a Form I-485 Application to Register Permanent Residence or Adjust Status is now $1,010 and the fee for a Form I-130 Petition for Alien Relative is $355. "Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule," 72 Fed. Reg. 4888, (Feb. 1, 2007) (amending 8 C.F.R. § 103).

The Third Circuit's decision is evidently contrary to the legislative intent of enacting the VWP as it pertains to cost savings. But more importantly, this decision undermines another important legislative purpose, which is to allow the U.S. Department of State to strategically allocate scarce consulate resources, considered America's outer layer of national defense, from less problematic posts located at VWP countries to posts where there is a high rate of fraud. Thus, tracking the reasoning of its sister circuits, the Third Circuit not only ignores almost three decades of Government policy and procedure in adjusting VWP immediate relatives overstays but also creates a potentially perilous precedent warranting this Court's review.

CONCLUSION

A fundamental disagreement exists between seven Courts of Appeals, who would forbid the adjudication of an adjustment of status application filed by an immediate relative VWP overstay, and the Government, who has traditionally exhibited a willingness to grant adjustments to such individuals. While the rule forged by the Courts of Appeals is plagued by error, the Government has responded to the split of opinions by continuing to adjudicate the majority of applications while randomly refusing to adjudicate others. As a result, thousands of marriages between American citizens and their VWP entrant spouses have been jeopardized by the threat of the unduly harsh punishment of removal of the immediate relative for minor status violations.

Petitioner respectfully requests that this Court grant his petition for writ of certiorari to address the questions presented, which affect not only him but thousands of others nationwide.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED APRIL 22, 2010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-4184

HEATHCLIFFE JOHN BRADLEY,

Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent

On Petition for Review of an Administrative Order of Removal of the Department of Homeland Security Ordering Removal pursuant to 8 U.S.C. § 1187 (A87-074-865)

Argued March 11, 2010

Before: AMBRO, SMITH and ALDISERT,
Circuit Judges
(Filed: April 22, 2010)

Appendix A

OPINION OF THE COURT

ALDISERT, Circuit Judge.

Petitioner Heathcliffe John Bradley, a citizen and national of New Zealand, seeks review of a final removal order of the Department of Homeland Security, Immigration and Customs Enforcement ("the Department"). Bradley contends that the Department's removal order is void under Woodby v. INS, 385 U.S. 276, 286, 87 S. Ct. 483, 17 L. Ed. 2d 362 (1966), because the record lacks "clear, unequivocal, and convincing evidence" that he waived his right to contest his removal under the Visa Waiver Program ("VWP"), 8 U.S.C. § 1187. Bradley additionally contends that he did not validly waive his right to contest his removal under the VWP because his waiver was not "knowing and voluntary." Finally, Bradley contends that, notwithstanding any VWP waiver, he may renew his application for a marriage-based adjustment of status before an immigration judge. See 8 U.S.C. § 1255(c)(4). For the reasons that follow, we will deny his petition.[1]

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1. We have jurisdiction pursuant to 8 U.S.C. § 1252(a)(1), which permits us to review final orders of removal. Although some courts have suggested that 8 U.S.C. § 1187(b)(2) narrows our jurisdiction to review removal orders involving VWP entrants, see, e.g., Lacey v. Gonzales, 499 F.3d 514, 519 (6th Cir. 2007), we view § 1187(b)(2) as a substantive, rather than a jurisdictional, bar to a VWP entrant's ability to obtain relief from removal. In particular, § 1187(b)(2) does not appear to abrogate 8 U.S.C. § 1252(a)(2)(D), which provides that

(Cont'd)

Appendix A

I.

Bradley arrived in the United States on August 28, 1996 without a valid non-immigrant visa, but was admitted under the VWP. Bradley represents that he was intoxicated when he arrived, and he claims to have

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(Cont'd)

"[n]othing . . . in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals." We are further persuaded that § 1187(b)(2) is not jurisdiction-stripping because it does not clearly and explicitly deprive federal courts of jurisdiction. See Calcano-Martinez v. INS, 533 U.S. 348, 351-352, 121 S. Ct. 2268, 150 L. Ed. 2d 392 (2001) (concluding that "Congress has not spoken with sufficient clarity to strip the district courts of jurisdiction to hear habeas petitions raising" claims not reviewable by petitions for direct review). Compare 8 U.S.C. § 1187(b)(2) (providing that a VWP entrant must "waive any right . . . to contest . . . any action for removal"), with, e.g., 8 U.S.C. § 1158(a)(3) ("No court shall have jurisdiction to review . . . ."), 8 U.S.C. § 1252(a)(2)(A),(B) (same), and 8 U.S.C. § 1252(a)(5) ("For purposes of this Act, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms 'judicial review' and 'jurisdiction to review' include habeas corpus review . . . and review pursuant to any other provision of law (statutory or nonstatutory)."). In view of the "strong presumption in favor of judicial review of administrative action," INS v. St. Cyr, 533 U.S. 289, 298, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), we do not believe that § 1187(b)(2) affects our jurisdiction to consider Bradley's claims. As we will explain, however, § 1187(b)(2) has a significant effect on Bradley's ability to pursue substantive relief from removal.

little recollection of his admission. Nevertheless, Bradley's declaration establishes that, after his arrival, he signed a form, presented that form to a customs officer, and was admitted into the United States. According to Bradley,

> [u]pon my arrival at John F. Kennedy International Airport in New York, I was given a form to complete, which I vaguely recall completing or even signing for that matter. . . . I handed the form to the Custom's agent, who waived me through after taking a part of my form, without any questions.

(Bradley Decl. ¶¶ 18, 20 (errors in original).) According to his Form I-94W Departure Record, Bradley was authorized to remain in the United States for the 90-day period ending November 27, 1996. (App. [2] 8.) It is undisputed that Bradley remained in the United States beyond his authorized stay, and that he remains here still.

On July 29, 2006, Bradley married Cheryl Losee, a United States citizen. In December 2007 and with the assistance of an attorney, Bradley and Losee applied to United States Citizenship and Immigration Services to adjust Bradley's status to that of a lawful permanent resident. In conjunction with that application, Bradley's wife filed an I-130 immediate-relative visa petition, a

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2. "App." refers to the petitioner's appendix, while "Resp't App." refers to the respondent's appendix.

prerequisite to obtaining a marriage-based adjustment of status. That petition was denied pursuant to 8 C.F.R. § 103.2(b)(13) when Bradley and Losee failed to appear for a scheduled interview.

On October 8, 2008, Bradley was arrested and ordered removed, pursuant to 8 U.S.C. § 1187(b). On October 14, 2008, Bradley filed a Petition for Review in this Court and moved for a stay of removal. On November 10, 2008, we stayed Bradley's removal order, and on November 14, 2008, Bradley was released from incarceration, pending our review.

II.

Before we address Bradley's contentions, we first review the purpose and role of the VWP within our nation's body of immigration law.

Congress established the VWP "'to facilitate international travel and promote the more effective use of the resources of affected government agencies while not posing a threat to the welfare, health, safety, and security of the United States.'" *Nose v. Att'y Gen.*, 993 F.2d 75, 77 n.2 (5th Cir. 1993) (quoting 53 Fed. Reg. 24,898 (1988)). Under the VWP, a qualifying visitor may enter the United States without obtaining a visa, so long as a variety of statutory and regulatory requirements are met. Among other things, a visitor seeking admission under the VWP must execute certain immigration forms, present a passport from a qualifying country, and possess a round-trip ticket. 8 U.S.C. § 1187(a). Once

admitted under the VWP, a visitor may remain in the United States for 90 days. 8 U.S.C. § 1187(a)(1).

Although the VWP affords visitor aliens with great flexibility and convenience, those benefits come at a cost. Most significantly, a VWP visitor must waive his or her right to contest the government's admissibility determinations and removal actions, except that the alien may contest removal actions on the basis of asylum.[3] 8 U.S.C. § 1187(a)-(b). Accordingly, a VWP applicant must, prior to admission, present U.S. officers with a "completed, signed Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form," 8 C.F.R. § 217.2(b)(1), expressly waiving, inter alia, any "right. . . to contest, other than on the basis of an application for asylum, any action for removal of the alien." 8 U.S.C. § 1187(b)(2). This requirement is ironclad. Indeed, a VWP applicant "may not be provided a waiver under the program unless" the alien has signed a VWP waiver,

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3. The VWP's waiver provision states:

> An alien may not be provided a waiver under the program unless the alien has waived any right—
>
> (1) to review or appeal under this Act of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or
>
> (2) to contest, other than on the basis of an application for asylum, any action for removal against the alien.

8 U.S.C. § 1187(b).

id., and an applicant who does not sign will be refused admission and removed, see 8 C.F.R. § 217.4(a)(1).

For a VWP entrant, the effects of this no-contest provision are severe. A VWP entrant waives the right to assert any non-asylum objection to his removal. 8 U.S.C. § 1187(b)(2). Additionally, unlike the ordinary removal case, a VWP entrant's removal "shall be determined by the district director who has jurisdiction over the place where the alien is found, and shall be effected without referral of the alien to an immigration judge for a determination of deportability." 8 C.F.R. § 217.4(b). But as the Court of Appeals for the Ninth Circuit has recognized, given the ease and convenience with which a VWP visitor may enter the United States, the VWP's "linchpin . . . is the waiver, which assures that a person who comes here with a VWP visa will leave on time and will not raise a host of legal and factual claims to impede his removal if he overstays." Handa v. Clark, 401 F.3d 1129, 1135 (9th Cir. 2005). With these precepts in mind, we turn to Bradley's challenge to his VWP waiver.

III.

We first address Bradley's contention that the Department's removal order is invalid under Woodby v. INS, 385 U.S. at 286, because it was entered without "clear, unequivocal, and convincing evidence" that he waived his due process right to contest his removal. In particular, Bradley contends that because his removal order referred to his VWP waiver, that waiver is a

"ground for deportation," subject to proof by clear, unequivocal and convincing evidence under Woodby. He contends that because the Department failed to produce his signed I-94W form, it has not met its burden of proof, rendering his removal order invalid. We disagree.

Although we doubt Bradley's assumption that the Department must prove his waiver by "clear, unequivocal, and convincing evidence," we hold that the Department has easily met that burden. Bradley admits that he entered the United States under the VWP, and although his declaration is vague, he concedes that he signed a form, presented that form to a customs officer, and was admitted into the United States. (*See* Bradley Decl. ¶¶ 18, 20.) Consistent with that account, the record contains the top portion of a Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form, filled out in handwriting "Bradley, Heathcliffe," date of birth "07 10 72," and stamped with Bradley's admission date of "Nov 27 1996." (App. 8.) Bradley's admissions, together with the documentary evidence, constitute powerful evidence that Bradley signed a Form I-94W, including a waiver of due process rights, before he was admitted to the United States.

This evidence becomes nearly irrefutable in view of the regulations and procedures governing admission under the VWP. Under the regulations, each VWP applicant must present a "completed, signed Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form," 8 C.F.R. § 217.2(b)(1), which contains the VWP waiver (Resp't App. 1). During the admission process

"[t]he departure record at the bottom of the form is retained by the alien, while the immigration official admitting the alien keeps the top portion, including the signed waiver." (Resp't Br. 14 n.8.) Significantly, "an alien may not be provided a waiver under the program unless the alien has waived any right . . . to contest . . . any action for removal," 8 U.S.C. § 1187(b)(2), and any alien who does not sign the VWP waiver will be refused admission, *see* 8 C.F.R. § 217.4(a)(1). Because "agency action . . . is entitled to a presumption of regularity," *McLeod v. INS*, 802 F.2d 89, 95 (3d Cir. 1986), we presume that the Department admitted Bradley under the VWP only after collecting the top portion of his completed I-94W form, including his signed VWP waiver. Although this presumption is rebuttable, *id.*, Bradley has adduced no evidence that the Department admitted him in violation of its own regulations, and in fact, his declaration is entirely consistent with a routine admission under the VWP. We conclude, therefore, that the evidence is more than sufficient to prove Bradley signed a VWP waiver, even assuming that waiver must be proven by "clear, unequivocal, and convincing evidence." As we suggested at oral argument, this contention is underwhelming.

IV.

Bradley next contends that his VWP waiver is invalid because it was not "knowing and voluntary," and he urges us to adopt the "knowing and voluntary" requirement embraced by the Courts of Appeals for the Fifth and Seventh Circuits. *See Bayo v. Napolitano*, 593

F.3d 495, 505 (7th Cir. 2010) (en banc); *Nose v. Att'y Gen.*, 993 F.2d 75, 79 (5th Cir. 1993). Tracking the reasoning of these decisions, Bradley argues that, as with other waivers of constitutional rights, a VWP waiver of due process rights is not constitutionally enforceable unless it is knowing and voluntary. Bradley contends that his specific waiver was not knowing and voluntary because he was intoxicated when he signed it. At the very least, Bradley contends, he is entitled to adjudicate the constitutional validity of his waiver before an immigration judge. We cannot agree.

In all respects, Bradley's claim amounts to a challenge of his removal order under the Due Process Clause of the Fifth Amendment, and consequently, he cannot prevail without "an initial showing of substantial prejudice." *Khan v. Att'y Gen.*, 448 F.3d 226, 236 (3d Cir. 2006) (citation and quotation marks omitted).[4] Thus, even assuming without deciding that Bradley's VWP waiver must be "knowing and voluntary," Bradley cannot invalidate his removal order unless he can demonstrate he was "substantially prejudiced" by his allegedly unknowing waiver. He cannot.

Bradley's prejudice argument is soundly defeated by the cogent reasoning of the *en banc* Court of Appeals for the Seventh Circuit in *Bayo v. Napolitano*, 593 F.3d 495 (7th Cir. 2010) (en banc), a case factually on all fours

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4. See also *Khouzam v. Att'y Gen.*, 549 F.3d 235, 258 (3d Cir. 2008); Wilson v. Ashcroft, 350 F.3d 377, 381 (3d Cir. 2003) (stating the rule in terms of "prejudice").

with this one. There the court reconsidered a panel decision granting petitioner Bayo's petition for review and ordering the Department to conduct a hearing to determine whether his VWP waiver was knowing and voluntary. *Id.* at 507. Although the *en banc* court agreed with the panel's conclusion that a VWP waiver must be knowing and voluntary, it rejected Bayo's due process claim because he could not show prejudice. As the court explained,

> [h]ad he known what the waiver said, Bayo would have had two options, either of which would have led to summary removal. If he had signed the waiver anyway, knowing full well what it said, he would be in the same situation as he is now. If he had refused to sign, he would have been removed summarily at the border because he did not have a proper visa. Perhaps there is a slight chance that after removal, Bayo could have obtained a visa to come to the United States, and then he might have settled in Indiana, met Tatiana Sia, and married her, allowing him to adjust his status based on marriage at that time. As Bayo admits in his brief though, "[i]t is difficult to compare what might have been with what is." This is true, and it is the reason why we find the explanation of how Bayo might have been harmed too speculative to support a showing of prejudice.

Id. at 506. Similarly, Bradley cannot show he has been prejudiced by an unknowing or involuntary waiver

because any harm would be too speculative. The consequence he now faces — summary removal — is the same consequence he would have faced had he known of the waiver and refused to sign. He has failed to demonstrate how his knowledge of the waiver realistically could have changed this outcome.

Resisting this conclusion, Bradley urges us to focus our prejudice inquiry not on the time of entry, but on the summary removal resulting from the Department's enforcement of his allegedly unknowing waiver. He contends that his unknowing waiver is prejudicial because it deprives him of his right to contest his removal on the basis of his petition for adjustment of status. This argument fails as well.

Bradley's VWP waiver was an express condition precedent to his 1996 entry to the United States, and he would not have been admitted without it. The prejudice of which he complains — summary removal without a hearing — is a direct consequence of the VWP's congressional design and implementing regulations, and not Bradley's alleged failure to comprehend the terms of his VWP visitor status. *See* 8 C.F.R. § 217.4(b) (providing that removal of a VWP entrant "shall be effected without referral of the alien to an immigration judge for a determination of deportability"). To prevail on his due process claim, Bradley must demonstrate substantial prejudice resulting from the due process violation he has alleged — his unknowing waiver of constitutional rights. Accordingly, Bradley must prove that, but for his

ignorance of the VWP waiver, he could otherwise contest his removal on the basis of his petition for adjustment of status. This, he cannot do. Had Bradley known the contents of the waiver and refused to sign, he would be in the same position as he is now — subject to summary removal without a hearing — and he would not now be eligible to adjust his status on the basis of his marriage to Cheryl Losee. As in Bayo, "the explanation of how [Bradley] might have been harmed [is] too speculative to support a showing of prejudice." Bayo, 593 F.3d at 506.

Likewise, we reject Bradley's contention that, under *Khouzam v. Attorney General*, 549 F.3d 235, 258 (3d Cir. 2008), we should presume substantial prejudice because Bradley received no process at all. Our Court held in Khouzam that a non-VWP petitioner was "inherently" and "substantially prejudiced" by a "complete absence of any process," when the government, without notice or a hearing, terminated the petitioner's deferral of removal under the Convention Against Torture. Id. at 239-240, 258. Distinct from Bradley, however, the petitioner in Khouzam did not waive his due process rights, and no statute conditioned his admission to the United States on an express waiver of these rights. See id. at 235-260. Although a complete denial of process may be inherently prejudicial in most cases, we find no inherent prejudice in the enforcement of an express due process waiver against an alien who has already received the benefit of that waiver. Consequently, in the VWP context, we will require the same showing of "substantial prejudice" required for

other due process challenges to orders of removal. See *Khan*, 448 F.3d at 236. Because Bradley cannot show prejudice, his due process claim does not carry.

V.

Bradley's final argument is that, even if his waiver is valid and enforceable, he is nevertheless entitled to pursue a marriage-based adjustment of status under 8 U.S.C. § 1255(c)(4).[5] He contends that, because 8 U.S.C. § 1255(c)(4) permits VWP entrants to adjust their status on the basis of an "immediate relative" petition,[6] a VWP entrant pursuing such an adjustment is "assimilated to the status of any other alien who has applied for adjustment of status . . . and is not subject to the VWP[] no contest-clause." (Pet'r Br. 33 (*citing Freeman v. Gonzales*, 444 F.3d 1031, 1037 (9th Cir. 2006).) Any other interpretation, he contends, would be

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5. The "adjustment of status" remedy permits the Attorney General, "in his discretion and under such regulations as he may prescribe," to adjust an alien's status to that of a lawful permanent resident if "(1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed." 8 U.S.C. § 1255(a).

6. More precisely, 8 U.S.C. § 1255(c)(4) generally makes VWP entrants ineligible for the "adjustment of status" remedy, but carves out an exception for VWP entrants seeking to adjust their status on the basis of an immediate-relative petition. The term "immediate relative" includes the spouse of a U.S. citizen. See 8 U.S.C. § 1151(b)(2)(A)(I).

illogical and would undermine congressional intent to make the adjustment of status remedy available to VWP entrants. Again, he is wrong.

Bradley's position has already been rejected by six of our sister Courts of Appeals, and we now join them in doing the same.[7] As the Court of Appeals for the Seventh Circuit explained in *Bayo*,

> [a]t first glance, it appears that there is a conflict between the adjustment-of-status statute, 8 U.S.C. § 1255(c)(4), and the VWP statute, 8 U.S.C. § 1187(b)(2). Upon closer examination, however, we believe that they can be reconciled. During the time when a nonimmigrant visitor is within the VWP's 90-day window, she may submit an adjustment-of-status application based on an immediate relative. An application submitted at that time would not represent a challenge to removal. After the visitor overstays her 90-day visit, however, the effect of the VWP waiver kicks in, preventing any objection to removal (except for asylum), including one based on adjustment of status.

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7. See Bayo v. Napolitano, 593 F.3d 495, 507 (7th Cir. 2010) (en banc); McCarthy v. Mukasey, 555 F.3d 459, 462 (5th Cir. 2009); Momeni v. Chertoff, 521 F.3d 1094, 1097 (9th Cir. 2008) (narrowing Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006)); Zine v. Mukasey, 517 F.3d 535, 543 (8th Cir. 2008); Lacey v. Gonzales, 499 F.3d 514, 519 (6th Cir. 2007); Schmitt v. Maurer, 451 F.3d 1092, 1097 (10th Cir. 2006).

Bayo, 593 F.3d at 507. We agree and hold that, although Bradley was once statutorily eligible under 8 U.S.C. § 1255(c)(4) for the adjustment he now seeks, he may not, after the expiration of his 90-day stay, adjust his status as a defense to removal. Bradley's VWP waiver squarely forecloses him from contesting his removal on this basis.

Contrary to Bradley's contention, the decision of the Ninth Circuit Court of Appeals in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), does not compel another result. Although that case ruled the VWP's no-contest clause inapplicable when "a VWP visitor properly files an adjustment of status application," *id.* at 1035, the court subsequently narrowed that decision to cover only VWP entrants who petition to adjust their status during their lawful 90-day stay, *see Momeni v. Chertoff*, 521 F.3d 1094, 1097 (9th Cir. 2008). Thus, after *Momeni*, a VWP entrant in the Ninth Circuit may contest her removal on the basis of an adjustment-of-status petition filed during her lawful 90-day stay, but as in the other Courts of Appeals, not on the basis of a petition filed after that period. *See Lacey*, 499 F.3d at 519 n.6 (emphasizing that *Freeman* does not apply to adjustment of status petitions filed by VWP overstays). Thus, even if we adopted *Freeman*, that decision would be unavailing to Bradley, who petitioned for an adjustment of status years beyond the expiration of his authorized stay. Consequently, we conclude that Bradley's VWP waiver

forecloses him from contesting his removal via a petition for adjustment of status.[8]

VI.

For the foregoing reasons, we will deny Bradley's petition for review.

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8. At oral argument and in a supplemental letter to this Court under Rule 28(j) of the Federal Rules of Appellate Procedure, Bradley raised the argument that certain regulations of the Department of State (namely, the so-called "30/60 day rule" found at 9 *Foreign Affairs Manual* 40.63 n.4.7-1 to 4.7-4) render § 1255(c)(4)'s adjustment of status provision a nullity for VWP entrants. This argument did not appear in Bradley's opening brief nor in his reply brief, and we deem it waived. *See United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005) ("It is well settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal."); *Lattab v. Ashcroft*, 384 F.3d 8, 17 (1st Cir. 2004) (noting "[t]he usual rule, . . . that new theories cannot be raised in a post-argument Rule 28(j) filing").

APPENDIX B — ORDER OF REMOVAL FOR DEPORTATION UNDER SECTION 217 OF THE IMMIGRATION & NATIONALITY ACT DATED OCTOBER 18, 2008

ORDER OF REMOVAL FOR DEPORTATION UNDER SECTION 217 OF THE IMMIGRATION & NATIONALITY ACT

To: BRADLEY, Heathcliffe John
Re: A File #: 87 074 865

Inasmuch as:

1) You are neither a citizen nor a national of the United States, and

2) You are a native of the New Zealand and a citizen of New Zealand, and

3) You were admitted to the United States on or about August 28, 1996 at or near New York, New York under Section 217 of the Immigration and Nationality Act, and you were authorized to remain in the United States for a period not to exceed ninety days, and

4) You have violated the conditions of your admission under Sections 237(a)(1)(B) because you remained in the United States for a longer period of time than authorized by the Attorney General, and

Appendix B

5) You have waived your right to contest any action for removal, except to apply for asylum, having applied for admission under Section 217 of the Immigration and Nationality Act.

By virtue of the authority vested in the Attorney General of the United States, and in me as his delegate, by the laws of the United States,

I HEREBY ORDER that you be removed from the United States of America.

s/ Scott A. Weber — 10/18/2008
Scott A. Weber — Date
Field Office Director
US Immigration and Customs Enforcement
Newark Field Office
Newark, New Jersey

APPENDIX C — NOTICE OF DECISION DATED JUNE 5, 2008

U.S. CITIZENSHIP AND IMMIGRATION SERVICES

Date: June 5, 2008

Heathcliffe Bradley
19 Crescent Road
West Milford, NJ 07480

File Number: A 087 074 865
Receipt Number: MSC-08-072-19011

NOTICE OF DECISION

Your Application to Register Permanent Residence or Adjust Status (Form 1-485), pursuant to section 245 of the Immigration and Nationality Act (the Act), is denied for the reasons stated in the attached decision.

USCIS is not initiating removal procedures against you at this time. The decision resulting in the denial of Form 1-485, leaves you without lawful immigration status and you are now present in the United States in violation of the law. You are required to depart the United States within thirty (30) days from the date of this decision, or be subject to removal proceedings. Remaining in the United States beyond this time will also affect your ability to return to the United States. Also, as of the date of this notice, any employment authorization

and/or travel documents previously granted to you based on the pendency of your application are hereby revoked.

s/ Kimberly Zallotti
Kimberly Zallotti
Field Office Director

Appendix C

ATTACHMENT

Petitioner: Cheryl Losee
Petition for Alien Relative, Form 1-130
Alien Number (Beneficiary): A 087 074 865
Receipt Number: MSC-08-050-12291

PROCEDURAL HISTORY

On December 11, 2007, you filed a Petition for Alien Relative on behalf of Heathcliffe Bradley. The petition, filed by a United States citizen or lawful permanent resident, seeks to confer the benefits of Section 201(b) of the Immigration and Naturalization Act (the Act) upon the beneficiary.

APPLICABLE LAW AND DISCUSSION

Title 8, Code of Federal Regulations, Part 103.2(b)(13) states in part:

> (ii) *Failure to appear far biometrics capture, interview or other required in-person process.* Except as provided in 8 CFR 335.6, if USCIS requires an individual to appear for biometrics capture, an interview, or other required in-person process but the person does not appear, the application or petition shall be considered abandoned and denied unless by the appointment time USCIS has received a change of address or rescheduling request that the agency concludes warrants excusing the failure to appear.

Appendix C

You were first scheduled to appear for an interview on March 26, 2008. That interview was adjourned at your request. On April 9, 2008 you were notified in writing to appear for an interview on May 29, 2008, at the USCIS Newark Field Office. You failed to appear for the interview as scheduled. A request to reschedule your interview was received on May 02, 2008; however the request has been denied because you failed to show good cause for your failure to appear.

CONCLUSION

Accordingly, the visa petition you filed on behalf of Heathcliffe Bradley is deemed abandoned and denied pursuant to 8 CFR §103.2(b)(13).

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC FILED JUNE 21, 2010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-4184

HEATHCLIFFE JOHN BRADLEY,

Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent

On Petition for Review of an Administrative Order of Removal of the Department of Homeland Security Ordering Removal pursuant to 8 U.S.C. § 1187 (A87-074-865)

Before: McKEE, *Chief Judge,* SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., VANASKIE and ALDISERT*, *Circuit Judges.*

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* Vote limited to panel rehearing

Appendix D

SUR PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

The petition for rehearing filed by Petitioner having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is hereby **DENIED.**

BY THE COURT:

/s/ **Ruggero J. Aldisert**
Circuit Judge

Dated: June 21, 2010

Supreme Court, U.S.
FILED
NOV 22 2010
OFFICE OF THE CLERK

No. 10-397

In the Supreme Court of the United States

HEATHCLIFFE JOHN BRADLEY, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Visa Waiver Program (VWP), aliens from designated countries who intend to visit the United States for business or pleasure for no more than 90 days may enter without a visa, but as a condition of that visa-free entry, the alien must "waive[] any right * * * to contest, other than on the basis of an application for asylum, any action for removal of the alien." 8 U.S.C. 1187(b)(2). Under a separate provision, an alien admitted under the VWP is eligible, based on marriage or other immediate family relationship to a United States citizen, to apply for the discretionary benefit of "adjustment of status" to that of lawful permanent resident. 8 U.S.C. 1255(a) and (c)(4). The question presented is:

Whether an alien who waived his rights under the VWP and who has overstayed the term of lawful admission may contest his removal by applying for adjustment of status and demanding the right to present that application to an immigration judge in removal proceedings.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 16
Appendix A – Decision denying motion to reconsider (Nov. 18, 2010) 1a
Appendix B – Decision denying motion to reconsider (Nov. 1, 2010) 16a

TABLE OF AUTHORITIES

Cases:

Bayo v. *Napolitano*, 593 F.3d 495 (7th Cir. 2010) 3, 8, 9
Elkins v. *Moreno*, 435 U.S. 647 (1978) 4
Ferry v. *Gonzales*, 457 F.3d 1117 (10th Cir. 2006) 12
Freeman, In re, 489 F.3d 966 (9th Cir. 2007) 13
Freeman v. *Gonzales*, 444 F.3d 1031 (9th Cir. 2006) 11, 13
Handa v. *Clark*, 401 F.3d 1129 (9th Cir. 2005) 3, 13
Lacey v. *Gonzales*, 499 F.3d 514 (6th Cir. 2007) 9
McCarthy v. *Mukasey*, 555 F.3d 459 (5th Cir. 2009) ... 9, 12
Momeni v. *Chertoff*, 521 F.3d 1094 (9th Cir. 2008) 9, 11, 12
Reno v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) 3
Schmitt v. *Maurer*, 451 F.3d 1092 (10th Cir. 2006) 9
Yauri, In re, 25 I. & N. Dec. 103 (B.I.A. 2009) 14
Zine v. *Mukasey*, 517 F.3d 535 (8th Cir. 2008) 9

Statutes and regulations: Page

Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359:
§ 117, 100 Stat. 3384 11
§ 313(a), 100 Stat. 3437 11
§ 313(c), 100 Stat. 3438 11
8 U.S.C. 1101(a)(15)(B) 1
8 U.S.C. 1151(b)(2)(A)(i) (Supp. III 2009) 4
8 U.S.C. 1182(a)(7)(B)(i)(II) 1, 13
8 U.S.C. 1184(a)(1) (Supp. III 2009) 5
8 U.S.C. 1187(a) (2006 & Supp. III 2009) 2, 13
8 U.S.C. 1187(b) 2, 11, 13
8 U.S.C. 1187(b)(2) 8, 10
8 U.S.C. 1201(a)(1)(B) 2
8 U.S.C. 1201(g) 2
8 U.S.C. 1227(a)(1)(B) 5
8 U.S.C. 1229a 3, 4, 5
8 U.S.C. 1252 3
8 U.S.C. 1252(a)(2)(B)(i) 4
8 U.S.C. 1255(a) 3, 9, 10
8 U.S.C. 1255(c) 4
8 U.S.C. 1255(c)(2) 10, 11
8 U.S.C. 1255(c)(4) 4, 9, 10, 11, 12
8 C.F.R.:
Section 103.2(b)(15) 4
Section 103.3(a)(1)(ii) 4
Section 204.1(a)(1) 4
Section 204.2 4

Regulations—Continued: Page

Section 214.1(a)(3)(ii) 5
Section 217.2(a) 2
Section 217.2(b)(1) 2
Section 217.4(a)(1) 2
Section 217.4(b) 5
Section 217.4(b)(1) 3, 12
Section 217.5(c) 2
Section 245.2(a)(1) 4
Section 245.2(a)(3)(ii) 4
Section 245.2(a)(5)(ii) 4, 5, 12
Section 1003.1(b)(5) 4
Section 1208.2(c) 3
Section 1208.2(c)(1)(iv) 3
22 C.F.R.:
Section 41.12 1
Section 41.31 1
Section 41.101 2
Section 41.102 2

Miscellaneous:

73 Fed. Reg. 67,354 (2008) 2
H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1 (1986) 13
H.R. Rep. No. 564, 106th Cong., 2d Sess. (2000) 13

In the Supreme Court of the United States

No. 10-397

HEATHCLIFFE JOHN BRADLEY, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-17a) is reported at 603 F.3d 235.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 2010. A petition for rehearing was denied on June 21, 2010 (Pet. App. 24a-25a). The petition for a writ of certiorari was filed on September 20, 2010 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. An alien who wishes to visit the United States temporarily for business or pleasure ordinarily must obtain a nonimmigrant visitor's visa (B-visa). 8 U.S.C. 1182(a)(7)(B)(i)(II); 22 C.F.R. 41.12, 41.31; see 8 U.S.C.

1101(a)(15)(B) (definition of nonimmigrant visitor for business or pleasure). Such visas generally are obtained by applying, in person, to a United States Embassy or Consulate abroad. See 8 U.S.C. 1201(a)(1)(B); 22 C.F.R. 41.101, 41.102. Visa applications may be denied. See, *e.g.*, 8 U.S.C. 1201(g).

Through the Visa Waiver Program (VWP), however, aliens from designated countries may seek admission to the United States for up to 90 days as nonimmigrant visitors for business or pleasure without needing to obtain a nonimmigrant visitor's visa. 8 U.S.C. 1187(a) (2006 & Supp. III 2009).[1] To be eligible to obtain admission under the VWP, the alien must agree to waive any right (1) to administrative or judicial review of an immigration officer's determination as to admissibility, and (2) any right "to contest, other than on the basis of an application for asylum, any action for removal of the alien" after admission. 8 U.S.C. 1187(b). Applicants who do not execute a waiver of such rights "may not" be granted a visa waiver and will be refused admission and usually removed promptly. *Ibid.*; see 8 C.F.R. 217.4(a)(1). At the time pertinent to this case, applicants for admission executed the waiver at the time of admission by signing Form I-94W, an Arrival-Departure Record. See 8 C.F.R. 217.2(b)(1).[2]

Pursuant to the waiver, aliens admitted under the VWP who fail to comply with the terms of admission (including timely departing the United States) are not entitled to proceedings before immigration judges (IJs),

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[1] Designated countries are listed in 8 C.F.R. 217.2(a).

[2] Beginning in January 2009, aliens must execute the waiver of rights before departure for the United States, using the online Electronic System for Travel Authorization. See 8 C.F.R. 217.5(c); 73 Fed. Reg. 67,354 (2008).

except when they apply for asylum.[3] Removal decisions are instead made by the Department of Homeland Security (DHS). See 8 C.F.R. 217.4(b)(1) (removal of an alien admitted under the VWP "shall be effected without referral of the alien to an immigration judge for a determination of deportability, except * * * [for] an alien * * * who applies for asylum in the United States"), 1208.2(c)(1)(iv) (alien who is admitted under the VWP and overstays his 90-day authorization is "not entitled to [removal] proceedings under [8 U.S.C. 1229a]") (emphasis omitted). In proceedings before DHS, aliens may dispute their alleged identity and alienage, whether their last admission or entry into the United States actually was under the VWP, whether they validly waived their procedural rights, or the scope of the waiver. See, *e.g.*, *Handa* v. *Clark*, 401 F.3d 1129, 1133 (9th Cir. 2005).[4]

If DHS issues a VWP removal order, review lies directly in the court of appeals under 8 U.S.C. 1252. See Pet. App. 2a n.1 (citing cases). The scope of review, however, is limited to the same issues that could have been raised before DHS. See *ibid.*; *Bayo* v. *Napolitano*, 593 F.3d 495, 500 (7th Cir. 2010) (en banc).

b. Adjustment of status is a discretionary procedure by which the Secretary of Homeland Security allows an alien who has been "admitted or paroled into the United States" to become a lawful permanent resident. 8 U.S.C. 1255(a). Several categories of admitted aliens are ineli-

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[3] Aliens who pursue asylum claims are referred to immigration court for "asylum only" proceedings. 8 C.F.R. 217.4(b)(1), 1208.2(c).

[4] DHS retains prosecutorial discretion in appropriate cases to forbear from seeking to remove an alien from the United States. Cf. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-484 (1999).

gible to seek adjustment of status. 8 U.S.C. 1255(c). As relevant here, an alien admitted pursuant to the VWP is ineligible *unless* he is an "immediate relative" of a United States citizen. 8 U.S.C. 1255(c)(4). An "immediate relative" is defined to mean a spouse, parent, or child, with certain exceptions. 8 U.S.C. 1151(b)(2)(A)(i) (Supp. III 2009).

The exercise of discretion to adjust an alien's status is "a matter of grace, not right." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978). To pursue that discretionary benefit for an immediate relative, the citizen relative must first file a visa petition on Form I-130 with U.S. Citizenship and Immigration Services (USCIS), a component of DHS. Form I-130 establishes the immediate-relative relationship and the citizen relative's intention to obtain a visa for the alien relative. 8 C.F.R. 204.1(a)(1), 204.2. If an I-130 petition is denied, the denial may be appealed to the Board of Immigration Appeals (Board), except that no appeal is permitted if the petition is abandoned and denied for that reason. 8 C.F.R. 103.2(b)(15), 103.3(a)(1)(ii), 1003.1(b)(5).

Meanwhile, the alien relative, if in the United States, must submit to USCIS an application to adjust status on Form I-485. 8 C.F.R. 245.2(a)(1) and (3)(ii). After examining the alien's eligibility to adjust status, USCIS makes a discretionary decision whether to grant the benefit. That decision is not directly appealable. See 8 U.S.C. 1252(a)(2)(B)(i); 8 C.F.R. 245.2(a)(5)(ii). In some cases, however, when USCIS denies an adjustment application, the alien may obtain administrative review by renewing the application in immigration court, if removal proceedings under 8 U.S.C. 1229a are initiated. See 8 C.F.R. 245.2(a)(5)(ii). Not all aliens are subject to that kind of removal proceeding, however (and even

when they are, not all aliens' adjustment applications can be renewed there, see *ibid.*). As discussed above, aliens admitted under the VWP have no right to immigration court proceedings to contest their removal, and they therefore may not renew an adjustment-of-status application before an IJ. See *ibid.* ("Nothing in this section shall entitle an alien to [removal] proceedings under [8 U.S.C. 1229a] who is not otherwise so entitled.").

2. Petitioner, a citizen and national of New Zealand, arrived in the United States on August 28, 1996, without a valid nonimmigrant visa. Pet. App. 2a-3a. He was admitted under the VWP after he signed a form containing the required waiver of rights and presented the form to a customs officer upon arrival. *Id.* at 4a. The term of his admission was 90 days, or until November 27, 1996, but he has unlawfully remained in the United States ever since he arrived 14 years ago. *Ibid.*

In 2006, ten years after his arrival, petitioner married a United States citizen. Pet. App. 4a. The couple applied to USCIS for an immigrant visa and adjustment of petitioner's status to lawful permanent resident, but they failed to prosecute the applications by appearing for their scheduled interview. As a result, both applications were denied as abandoned in June 2008. *Id.* at 4a-5a, 20a-23a; App., *infra*, 4a-5a. Such denials are not appealable, see p. 4, *supra*, and the Board therefore dismissed for lack of jurisdiction an attempted appeal of the visa denial.

On October 8, 2008, petitioner was arrested and ordered removed by Immigration and Customs Enforcement because he had overstayed the 90-day period of admission under the VWP. Pet. App. 5a, 18a-19a; see also 8 U.S.C. 1184(a)(1) (Supp. III 2009), 1227(a)(1)(B); 8 C.F.R. 214.1(a)(3)(ii), 217.4(b). Petitioner was re-

leased from detention, see Pet. 4, and has not yet been removed.

3. Petitioner sought review of his removal order in the court of appeals. He contended that the removal order was invalid and that he was entitled, as an immediate relative, to renew his adjustment application before an IJ in removal proceedings. Pet. C.A. Br. 14-46.

4. The court of appeals denied the petition for review. Pet. App. 1a-17a.

As relevant here, the court of appeals concluded that petitioner "may not, after the expiration of his 90-day stay, adjust his status as a defense to removal." Pet. App. 16a. The court joined the unanimous view of six other circuits in so holding. See *id.* at 15a & n.7.

The court explained that petitioner has waived the right to object to removal on any ground except for asylum. Pet. App. 15a.[5] Petitioner's attempt to challenge his removal based on his desire to renew an adjustment application that he filed long after he overstayed his 90-day visit, the court held, was the sort of objection to removal that petitioner waived. *Ibid.*

The court of appeals reserved the question whether, as one other circuit has held, a VWP alien may renew his application in immigration court if it is first timely filed during the 90-day admission period. Such a holding would not benefit petitioner, the court stated, because

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[5] Petitioner devoted much of his briefs in the court of appeals to arguments that he did not sign the waiver and that, if he did, his waiver was not knowing and voluntary. The court of appeals rejected those arguments, holding that, even if a heightened standard applied, the government had "easily" met its burden of proving that petitioner signed the waiver and petitioner had not shown any prejudice from his supposedly unknowing signature. Pet. App. 8a; see *id.* at 5a-14a. Petitioner does not renew his attacks on his waiver in this Court.

he "petitioned for an adjustment of status years beyond the expiration of his authorized stay." Pet. App. 16a.

5. The court of appeals denied rehearing en banc without recorded dissent. Pet. App. 24a-25a.

6. After petitioner was ordered removed, petitioner and his wife filed with USCIS a new visa petition and application for adjustment of status. Pet. C.A. Br. 11 n.8. The visa petition was approved in 2009. On March 3, 2010, however, while this case was pending in the court of appeals, USCIS denied petitioner's adjustment application as a matter of discretion—not as a matter of eligibility. Among the grounds cited for the denial was petitioner's unauthorized employment in the United States and his overall disregard of the immigration laws. App., *infra*, 5a-6a.

Petitioner moved USCIS for reconsideration. Although initially USCIS denied reconsideration on grounds of ineligibility, citing the court of appeals' decision, App., *infra*, 16a-19a, USCIS subsequently withdrew that decision *sua sponte* and issued a new order denying reconsideration on the merits, not on grounds of ineligibility for adjustment of status. *Id.* at 1a-15a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of another court of appeals. Seven courts of appeals, including the court below, have concluded that an alien who obtains visa-free admission for 90 days by signing the VWP's waiver of rights,[6] and who then overstays the 90-day period of lawful admission, cannot belatedly contest his removal or trigger proceedings before an IJ by filing an applica-

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[6] Petitioner does not contest the voluntariness of his waiver in this Court. See note 5, *supra*.

tion for adjustment of status *after* overstaying. That holding correctly implements the statute specifying that aliens admitted under the VWP give up the right to contest their removal. The court of appeals did not address the further question whether aliens in petitioner's position may pursue adjustment of status outside the context of removal proceedings, and petitioner's assertions about USCIS's practices in granting or denying adjustment therefore are not relevant to the proper disposition of this case. Indeed, since the court of appeals' decision, petitioner himself has been denied adjustment of status on the merits and as a matter of discretion, not based on a per se rule of ineligibility. For those reasons, further review is not warranted.

1. a. Following the decisions of six other circuits, the court of appeals here correctly decided that an alien admitted into the United States under the VWP may not contest his removal based on an adjustment application filed after the 90-day period of lawful admission under the VWP. Pet. App. 14a-17a. Agreeing with a unanimous en banc decision of the Seventh Circuit, the court held that an alien admitted pursuant to the VWP waives "any objection to removal (except for asylum), including one based on adjustment of status." *Id.* at 15a (quoting *Bayo* v. *Napolitano*, 593 F.3d 495, 507 (7th Cir. 2010) (en banc)); see 8 U.S.C. 1187(b)(2) ("An alien may not be provided a waiver under the [VWP] unless the alien has waived *any* right * * * to contest, other than on the basis of an application for asylum, any action for removal of the alien.") (emphasis added). By specifying that asylum is the sole exception to the VWP's blanket waiver of contesting removal, Congress made clear that DHS is not required to make any further exception, including for adjustment of status. The courts of appeals

thus have uniformly concluded that an alien who is admitted pursuant to the VWP and overstays beyond the 90-day period of lawful admission cannot thereafter resist removal based on an application for adjustment of status. Pet. App. 15a & n.7; *Bayo*, 593 F.3d at 507; *McCarthy* v. *Mukasey*, 555 F.3d 459, 462 (5th Cir. 2009) (per curiam); *Momeni* v. *Chertoff*, 521 F.3d 1094, 1097 (9th Cir. 2008); *Zine* v. *Mukasey*, 517 F.3d 535, 543 (8th Cir. 2008); *Lacey* v. *Gonzales*, 499 F.3d 514, 519 (6th Cir. 2007); *Schmitt* v. *Maurer*, 451 F.3d 1092, 1097 (10th Cir. 2006).

In contending that the unanimous view of the courts of appeals is incorrect, petitioner relies on the statutory provision specifying eligibility to seek adjustment of status. In general, VWP aliens are excepted from eligiblity to seek adjustment of status, but those who qualify as immediate relatives fall within an exception to the exception. See 8 U.S.C. 1255(c)(4). Immediate relatives therefore are subject to the general rule that DHS *may* grant adjustment of status, "in [its] discretion and under such regulations as [it] may prescribe." 8 U.S.C. 1255(a). But nothing in that general rule, or in Section 1255(c)(4), provides that VWP aliens who are immediate relatives must be able to seek adjustment of status *in removal proceedings*. To the contrary, as the court of appeals explained, VWP aliens have waived any opportunity to use adjustment of status, or any ground except an application for asylum, to challenge removal. Pet. App. 15a (citing *Bayo*, 593 F.3d at 507). The court of appeals' reading gives effect to that statutorily required waiver.[7]

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[7] Petitioner also errs in suggesting (Pet. 15-18) that VWP aliens must be able to seek adjustment of status in removal proceedings to avoid

For the same reasons, petitioner errs in arguing (Pet. 13-14) that Section 1255(c)(4) is more "specific" than, and thus must control over, the statute specifying that a VWP alien "waive[s] *any* right * * * to contest, other than on the basis of an application for asylum, any action for removal of the alien," 8 U.S.C. 1187(b)(2) (emphasis added). The two statutes address different points: Section 1255(a) and (c)(4) governs a VWP alien's eligibility to seek adjustment of status generally; Section 1187(b)(2) specifically controls a VWP alien's ability to seek immigration benefits other than asylum *in removal proceedings*. Because a VWP alien who is an immediate relative may seek adjustment of status *outside* removal proceedings—in the manner specified "under [DHS] regulations," 8 U.S.C. 1255(a)—there is no conflict between the two statutes.

Petitioner's reliance on 8 U.S.C. 1255(c)(2) is similarly unavailing. Section 1255(c)(2) provides that an alien (whether or not admitted pursuant to the VWP) is ineligible to seek adjustment of status if he "is in unlawful immigration status on the date of filing the application of adjustment of status," or if he "has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status" in the United States since entering the country. An alien who is an immediate relative is exempted from that disqualification, see 8 U.S.C. 1255(c)(2), and therefore remains subject to the general rule that DHS *may* grant adjustment of status, "in [its] discretion and under such regulations as [it] may prescribe." 8 U.S.C. 1255(a). Thus, Section 1255(c)(2), like Section 1255(c)(4), pertains only to the

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"[n]ulli[fying]" Section 1255(c)(4). Pet. 15 (boldface omitted). See note 10, *infra*.

alien's eligibility to seek adjustment of status, not to whether the alien may use an application for adjustment of status as a basis to resist removal.[8]

b. One court of appeals has concluded that if a VWP alien submits a timely application for adjustment of status *during* the 90-day admission period, and that application is subsequently denied and the alien is ordered to leave the country, the alien may renew the timely application before an IJ in removal proceedings. See *Momeni*, 521 F.3d at 1096-1097; *Freeman* v. *Gonzales*, 444 F.3d 1031, 1033-1034, 1035-1037 (9th Cir. 2006). The Ninth Circuit has made clear, however, that aliens in petitioner's situation—VWP aliens who overstay their 90-day admission period *without* timely seeking adjustment of status—may not subsequently contest their removal by seeking adjustment of status before an IJ. *Momeni*, 521 F.3d at 1096-1097. And the court of appeals in this case did *not* decide the effect of an application timely filed within the 90-day admission period, because "even if [the court] adopted" the Ninth Circuit's rule, such a holding would not benefit petitioner. Pet. App. 16a.

The Ninth Circuit based its decision on the premise that a VWP alien who files an application for adjustment of status while lawfully in the United States has a right under the applicable *regulations* to renew adjustment applications before an IJ. See *Freeman*, 444 F.3d at 1035. Even if that premise were correct—a question not presented here—it plainly would not apply to aliens in petitioner's position, who seek to use an adjustment-of-

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[8] Significantly, the relevant provisions of 8 U.S.C. 1187(b) and 1255(c)(2) and (4) were all adopted at the same time. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §§ 117, 313(a) and (c), 100 Stat. 3384, 3437-3439.

status application as a basis for resisting removal. The regulation on which the *Freeman* panel relied expressly states that it does not confer a right to removal proceedings in immigration court on any alien "who is not otherwise so entitled," 8 C.F.R. 245.2(a)(5)(ii), and VWP admittees have waived any right to such a removal proceeding.[9] See *Ferry* v. *Gonzales*, 457 F.3d 1117, 1127-1128 (10th Cir. 2006); see also 8 C.F.R. 217.4(b)(1).

Petitioner contends (Pet. 6, 11-12, 15) that he should be treated the same way as an alien who files for adjustment of status within the 90-day admission period, because although he overstayed the admission period by nearly ten additional years before filing, he filed his adjustment application before DHS initiated removal proceedings. He therefore argues that his adjustment application was not a challenge to removal. But this case is an attempt to obtain judicial review of the order to remove petitioner from the United States, and to use adjustment as a means of avoiding removal. That is squarely within petitioner's VWP waiver. See *McCarthy*, 555 F.3d at 460-462; *Ferry*, 457 F.3d at 1126-1127.[10]

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[9] The *Freeman* panel did not address the effect of that regulatory provision, and the Ninth Circuit has not revisited that issue in light of its subsequent conclusion that aliens in petitioner's position cannot, *after* overstaying, contest their removal by seeking adjustment of status before an IJ. *Momeni*, 521 F.3d at 1096-1097.

[10] Petitioner contends (Pet. 15-16) that to give any effect to Section 1255(c)(4), which recognizes that VWP aliens who are immediate relatives are eligible to seek adjustment of status, those aliens must be able to do so beyond the 90-day admission period, because aliens who marry U.S. citizens soon after entry may be presumed to have misrepresented their intent to travel to the United States only temporarily. Petitioner waived that argument in the court of appeals, Pet. App. 17a n.8, and it is not correct in any event. First, as discussed above, eligibility to seek adjustment of status is distinct from eligibility to seek that discretion-

c. The court of appeals' decision is also consistent with the purpose and function of the VWP. In exchange for waiving rights to contest removal and seeking only a limited 90-day period of lawful admission, VWP admittees are able to avoid the inconvenience of applying for a B-visa before their travel—and the possibility that the visa might be denied in their individual cases. See 8 U.S.C. 1182(a)(7)(B)(i)(II), 1187(a) and (b) (2006 & Supp. III 2009); see also H.R. Rep. No. 564, 106th Cong., 2d Sess. 7 (2000) (2000 House Report). In return, the United States gains not only broad benefits—significantly reduced demands on Department of State overseas resources, increased economic activity by foreign visitors to the United States, improved international relations, and increased availability of reciprocal visa waiver benefits for United States citizens traveling abroad—but also the ability to remove any VWP alien rapidly when circumstances warrant. See 2000 House Report 7-8; H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 50 (1986); see also *Handa* v. *Clark*, 401 F.3d 1129, 1135 (9th Cir. 2005). If VWP admittees were able to

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ary relief *in a removal proceeding*. Second, petitioner incorrectly suggests that the only way for a VWP alien to qualify as an immediate relative is to marry a U.S. citizen after entry. A VWP alien may have immediate-relative status (parent, sibling, or spouse) at the time of entry, see, *e.g.*, *Freeman*, 444 F.3d at 1032 (alien married before entering under VWP), and even if not, the State Department manual provisions on which petitioner relies easily accommodate marriages that occur more than 30 days after entry, as petitioner acknowledges (Pet. 16). What matters is each alien's intent at the time of entry; as the Ninth Circuit has acknowledged, there is no conflict between the proposition that VWP aliens are not categorically ineligible for adjustment of status and the proposition that individual VWP aliens may be ineligible based on misrepresentations at the time of entry. See *In re Freeman*, 489 F.3d 966, 969 (9th Cir. 2007) (per curiam).

enter without obtaining a visa by consenting to streamlined removal, and then to evade or delay that streamlined removal simply by filing an adjustment application, the delicate balance struck by Congress among the many interests underlying the VWP would be upended.[11]

Petitioner's challenge to the court of appeals' holding therefore is unavailing.[12]

2. Petitioner contends (Pet. 6-10) that review by this Court is warranted to resolve a conflict between the courts of appeals and agency practice concerning *eligibility* for adjustment of status. Petitioner contends that USCIS has previously granted adjustment applications filed by aliens in petitioner's position, *i.e.*, VWP aliens who overstayed their 90-day period and sought adjustment only later. Indeed, petitioner's first question presented seeks review of the question whether petitioner "may adjust his status." Pet. i; see also Pet. 12, 15.

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[11] Petitioner's appeal to principles of family unity and cost savings (Pet. 18-21) neither outweighs these countervailing considerations nor warrants adopting petitioner's statutory interpretation. Moreover, DHS itself remains able to take into account family unity, resource constraints, and any other relevant considerations in deciding how best to proceed against a removable VWP admittee—including forbearing in appropriate cases from obtaining or executing a removal order while an adjustment application proceeds before USCIS. See note 4, *supra*; cf. *In re Yauri*, 25 I. & N. Dec. 103, 106-107 (B.I.A. 2009) (USCIS may grant adjustment of status to an arriving alien even after issuance of a removal order). Further, as petitioner recognizes (Pet. 17 n.2), even if DHS decides to remove him, it remains possible for him to pursue an immigrant visa from overseas and to gain lawful permanent resident status in this manner, provided he obtains any necessary waivers.

[12] Petitioner also invokes a rule of lenity (Pet. 14-15), but there is no ambiguity on the face of the relevant statutes, and even if there were, the traditional tools of statutory interpretation, the statutory purpose, and the agency's own interpretive authority would resolve it without the need to resort to any rule of lenity.

No such question and no such conflict are presented by this case. The court of appeals explained that petitioner "may not, after the expiration of his 90-day stay, adjust his status *as a defense to removal*." Pet. App. 16a (emphasis added). The court of appeals did not opine on whether petitioner remains eligible for USCIS to grant him adjustment as a matter of its discretion. Thus, petitioner's assertion (Pet. 7-10, 21) that USCIS's determinations concerning eligibility to seek adjustment have been inconsistent and "random[]" is based not on anything that has happened to petitioner's own application, but on a single, anecdotal newspaper article and on an informal poll reported in a practice manual. See Pet. 9.

Indeed, petitioner himself has been able to file applications for adjustment. USCIS has considered those applications notwithstanding petitioner's lengthy violation of the terms of his admission to the United States. And petitioner's most recent such application has already been denied on the merits, based on facts specific to petitioner. See p. 7, *supra*. Although USCIS, in denying reconsideration of that decision, initially suggested that the court of appeals' decision established that petitioner is ineligible to seek adjustment, USCIS has withdrawn that determination and again denied petitioner's application on the merits. See *ibid.*; App., *infra*, 1a-15a. Petitioner offers no reason to believe that USCIS's disposition of his petition would change if this Court granted review and held that petitioner is *eligible* for a discretionary grant of relief (Pet. i). This case therefore does not present any such eligibility question.

Rather, the only question decided below and properly presented here is whether petitioner may contest removal based on his adjustment application. As petitioner acknowledges, the courts of appeals unanimously

agree that he may not. No further review of that question is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

TONY WEST
Assistant Attorney General

DONALD E. KEENER
W. MANNING EVANS
Attorneys

NOVEMBER 2010

APPENDIX A

U.S. Department of Homeland Security
Citizenship and Immigration Services
Newark Field Office
970 Broad Street
Newark, NJ 07102

[SEAL OMITTED] **U.S. Citizenship and Immigration Services**

Heathcliffe John BRADLEY File: A87 074 865
[ADDRESS OMITTED] Date: [Nov. 18, 2010]

RE: Motion to Reconsider filed on April 7, 2010.

See attached decision on the above referenced matter.

Sincerely,

/s/ KIMBERLY ZANOTTI
KIMBERLY ZANOTTI
Field Office Director

JMD / Regular mail

cc: Harry ASATRIAN, Esq.

www.dhs.gov

ATTACHMENT

Date: [NOV. 18 2010]

File #: A87 074 865

Subject: Heathcliffe John BRADLEY

In Re: Motion to Reconsider Denial

Discussion:

Reference is made to the **Form I-290B, Notice of Appeal or Motion** (hereinafter referred to as the motion), filed on your behalf by your attorney, Harry ASATRIAN, on April 7, 2010 in connection with your Application to Register Permanent Residence or Adjust Status, (hereinafter referred to as your I-485). The basis of the motion is set forth in documents submitted in support. The fee receipt is dated April 7, 2010, which becomes the filing date for purposes of this decision. Your attorney filed this motion at the Newark Field Office. At the time of the filing, the following was submitted by your attorney:

(i) Form I-290B (with the appropriate fee),
(ii) A cover letter from the attorney of record,
(iii) A brief in support of the Motion dated April 2, 2010 signed by your attorney, and
(iv) A copy of the Service decision dated March 3, 2010.

The motion was originally denied on November 1, 2010 and later reopened on a Service motion on November 17, 2010.

The record reflects that you are a native and citizen of New Zealand and a beneficiary of an approved visa petition in immediate relative category as a spouse of a United States citizen. Your record with this Service reflects the following history:

The record reflects that you had entered the United States numerous times between 1983 and 1996. It revealed that you made 2 **entries as a G4, an International Organization Officer or Employee, or Immediate Family Member**: (i) on or about December 14, 1983, you entered the United States at or near Los Angeles, California and later departed on or about December 17, 1985, and (ii) on or about January 1, 1986, you made your entry at or near Honolulu, Hawaii and later departed on or about August 2, 1986. The Service record further reveals that you had made 4 **entries as a B2, a Visitor for Pleasure**: (i) on or about January 13, 1990, you entered at or near Honolulu, Hawaii and later departed on February 4, 1990; (ii) on or about December 19, 1990, you were inspected and admitted at or near Honolulu, Hawaii and consecutively departed the United States on or about January 21,1991; (iii) on or about December 29, 1992, you were inspected and admitted at or near Honolulu, Hawaii and later departed on or about January 25, 1993; and (iv) on or about June 05, 1993, you were inspected and admitted at or near Honolulu, Hawaii and departed on or about June 9, 1993. In addition, the Service record further reflects that you had made 5 **entries** into the United States **under the Visa Waiver Pilot Program** (hereinafter referred to as the VWP), pursuant to Section 217

of the Act as amended [1]: (i) on or about April 9, 1994, (ii) on or about September 12, 1994, (iii) on or about March 4, 1996, (iv) on or about May 26, 1996, and (v) on or about August 28, 1996. When you last entered, you were required to depart the United States on or before November 27, 1996. You remained in the United States past that date in violation of the United States immigration laws. *See* INA Section 237(a)(1)(C)(I).

The Service record reflects that on or about July 29, 2006, over 9 years and 11 months after your last entry into the United States, you married your United States citizen wife, Cheryl Denise LOSEE (hereinafter referred to as Cheryl). On or about December 11, 2007, Cheryl filed **Petition for Alien Relative, Form I-130** (hereinafter referred to the first visa petition) on your behalf. Concurrently with the filing of the first visa petition, an **Application to Register Permanent Residence or Adjust Status, Form I-485** (hereinafter referred to as your first I-485), to seek adjustment to the status of lawful permanent residence under Section 245 was filed by

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[1] Section 217 of the Act, as amended, states in pertinent part that:

[. . .] a [Visa Waiver] *program [. . .] under which the requirement of* [a visa] *may be waived by the Attorney General in consultation with the Secretary of State [. . .] in the case of a alien who meets* [certain statutory] *requirements [. . .].*

Section 217(b) of the Act, as amended, states in pertinent part that:

Waiver of rights. *An alien may not be provided a waiver under the* [visa waiver program for certain citizens] *unless the alien has waived any right—(1) to review or appeal under the Act of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, OR (2) to contest, other than on the basis of an application for asylum, any action for removal of the alien.*

you. On June 5, 2008, the first visa petition and your first I-485 were properly denied by the Service pursuant to 8 C.F.R. § 103.2(b)(13) for your failure to appear twice for your scheduled interview and for your failure to show good cause for your failure to appear. On October 8, 2008, the United States Immigration and Customs Enforcement, Detention and Removal Operations (hereinafter referred to as ICE DRO) issued an order of removal under section 217 of the Act. The same day, you were placed under arrest and transported to the Elizabeth Detention Facility pending removal from the United States. On or about October 27, 2008, Cheryl filed her second **Petition for Alien Relative, Form I-130** (hereinafter referred to as the second petition) on your behalf. Concurrently with the filing of the second visa petition, you filed an **Application to Register Permanent Residence or Adjust Status, Form I-485** (hereinafter referred to as your second I-485) seeking to adjust your status to that of a lawful permanent resident, i.e., a relief from your removal order. On November 10, 2008, the United States Court of Appeals for the Third Circuit granted your motion for a stay of removal based on the pendency of the second visa petition and second I-485. On April 20, 2009, you and Cheryl appeared for your interview at the Newark Field Office in connection with Cheryl's second visa petition and your second I-485. On September 16, 2009, the second visa petition was approved.

On March 3, 2010, the Service issued a decision denying your I-485 as a matter of discretion. In reaching its decision, the Service considered the following *favorable factors*: (i) you being a spouse of a United States citizen, and (ii) you being a beneficiary of an approved Form

I-130, Petition for Alien Relative (hereinafter referred to as the visa petition), filed on your behalf by your United States citizen wife. The Service noted, however, that your visa petition was approved after your removal order had been issued.[2] In addition, the Service considered the following unfavorable factors: (i) your outstanding order of removal, (ii) your overstayed admission, (iii) your violation of terms of your admission, (iv) your numerous prior admissions under the VWP and the number of VWP waivers previously executed, (v) your non-compliance with the VWP waiver, (vi) your marriage to a United States citizen spouse outside of 90 days following your arrival, (vii) your unauthorized employment, and (viii) your overall disregard of the United States immigration laws. The Service concluded that negative factors in your case substantially outweigh the positive factors and that you had failed to establish that your adjustment application merits favorable discretion.

On April 7, 2010, your attorney filed this motion to reconsider. On April 22, 2010, the United States Court of Appeals for the Third Circuit rendered its decision regarding your Petition for Review by the court. On November 1, 2010, the Service issued its original decision on you motion. On November 17, 2010, the Service reopened the denial of the reconsideration motion.

The Service will now reconsider the motion filed on your behalf on April 7, 2010. As stated before, the motion was filed with a brief signed by your attorney. In the brief, your attorney makes the following points:

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[2] Equities acquired after an order of deportation is issued are entitled to less weight than equities acquired during alien's authorized stay in the United States. *Wang v. INS*, 622 F.2d 1341, 1346 (9th Cir. 1980). *Ghassan v. INS*, 972 F.2d 631, 631-35 (5th Cir. 1992).

(i) **"Negative factors arise out of a single fact"**: The attorney states that three factors mentioned in the I-485 decision arise out of a single fact, i.e., you overstaying the terms of your entry and as such do not warrant four separate unfavorable factors, i.e., (i) outstanding removal order, (ii) overstaying terms of admission, (iii) violation of terms of admission, and (iv) disregard to US immigration laws. The ALM on-line dictionary[3] provides definitions of "a factor" and "a fact". "A factor" is defined as something that contributes to the final result while "a fact" is defined as an actual thing or happening, which must be proved at trial by presentation of evidence and which is evaluated by the finder of fact (a jury or the judge). In general, where an applicant is seeking discretionary relief from removal or deportation, the courts are required to weigh favorable equities or factors against unfavorable ones. Pursuant to section 245 of the Act, as amended, the adjudication of Form I-485 involves a similar weighing of favorable equities or factors against the unfavorable factors in order to determine whether to grant a discretionary benefit. In its decision, the Service considered the fact of you overstaying the terms of your admission as one of the unfavorable factors as well as consequences of your overstaying as additional unfavorable factors. The Service sees no feasible way to encompass all four factors into one as suggested by your attorney.

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[3] *See: http://dictionary.law.com*

(ii) **"The Field Office Director did not wait for the 3rd Circuit Court decision to permit a clearer resolution"**: Your attorney claims that the Service issued its March 3, 2010 decision without waiting for the decision of the Third Circuit Court. When issuing a decision on a pending case, the Service is not required by the statute, internal policy, and/or case law to wait for a final outcome of pending court litigation.

(iii) **"The Field Office Director did not consider all of the applicable law."**: The attorney refers to the following case law: *Bayo v. Napolitano*, 593 F.3d 495 (7th Cir. 2010) (en banc); *Nose v. Att'y Gen.*, 993 F.2d 75, 79 (5th Cir. 1993); *Khouzam v. Attorney General*, 549 F.3d 235, 258 (3d Cir. 2008) and one unpublished decision from the 11th Circuit Court. In his brief submitted in support of the Motion, your attorney refers mostly to decisions that were rendered by courts from jurisdictions outside of the Third Circuit and one unpublished decision and, as such, not binding. The case law cited by your attorney was addressed in the Third Circuit Court decision. For the purposes of this decision, the Service will rely on the case law interpretation provided by the court. As stated in the Third Circuit Court decision:

> *[. . .] we reject Bradley's contention that, under Khouzam v. Attorney General, 546 F.3d 235, 258 (3d Cir. 2008), we should presume substantial prejudice because Bradley received no process at all. Our*

Court held in Khouzam, that non-VWP petitioner was "inherently" and "substantially prejudiced" by a "complete absence of any process," when the government, without notice or a hearing, terminated the petitioner's deferral of removal [. . .]. Distinct from Bradley, however, the petitioner in Khouzam did not waive his due process rights, and no-statute conditioned his admission to the United States on an express waiver of these rights. [. . .]

(iv) **"The decision incorrectly applies the law regarding Mr. Bradley's eligibility to apply for adjustment of status."**: Your attorney purported that the Service relied on non-binding precedent decisions from other district courts. The Service disagrees with the assessment. In its decision, the Service referred to a number of, no just two, non-binding precedent decisions from other district courts to show a trend in adjudication of adjustment of status application filed by applicants who entered under the VWP. The Service decision to deny your second I-485 was not based on the non binding case law but rather on discretionary considerations.

(v) **"The government has failed to meet its duty of proving by clear, unequivocal, and convincing evidence [. . .] that Mr. Bradley in fact signed a VWP waiver, he should not be strictly bound by the terms of that waiver [. . .] the waiver is incorrectly presumed to be valid [. . .]"**: The Service contests that assessment.

Section 217(b) of the Act, as amended, states in pertinent part that:

> *Waiver of rights. An alien may not be provided a waiver under the* [visa waiver program for certain visitors] *unless the alien has waived any right—(1) to review or appeal under the Act of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or (2) to contest, other than on the basis of all application for asylum, any action for removal of the alien.*

An applicant for admission under the VWP can be admitted under the program if and only if he or she had signed a waiver of his/her rights to review, contest, and/or appeal any determination of his/her inadmissibility or any removal action (with a narrow exception for asylum claims).[4] If such a waiver is not executed

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[4] At the time of your admission, the waiver was executed by signing the reverse side of Form I-94, Nonimmigrant Visa Waiver Arrival/Departure Form.

by the applicant for admission, he/she is denied admission.

The record establishes by clear and convincing evidence that your last admission in to the United States was under the VWP, possible if and only if the waiver had been signed by the applicant for the admission. On your first and second I-485, you stated that you had been admitted to the United States under the VWP on August 28, 1996. In support of your second I-485, you submitted a copy of **Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form**, reflecting your admission under the VWP on August 28, 1996. In addition, the Service record reflects your admission under the VWP on or about August 28, 1996. As previously stated, the record reflects that it was your fifth admission under the VWP. The Service asserts that the evidence of record constitutes clear and convincing evidence of your execution of the VWP waiver on August 28, 1996.

(vi) **"Unauthorized Employment and Overstaying Should Not Be Considered Negative Factors for *Immediate Relatives*"**: Your attorney cites 8 CFR section 245.1(b)(1)-(4) and argues that your unauthorized employment and overstaying should not be considered as negative factors. 8 CFR section 245.1(b)(1)-(4) lists categories of aliens who are not eligible to apply for adjustment of status pursuant to section 245(a) and must qualify for adjustment under section 245(i) of the Act in order to be eligible

to apply. The list contains individuals who engaged in unlawful employment. The regulation makes exception for immediate relatives; as defined in 201(b) of the Act. 8 CFR section 245.1(b)(1)-(4) defines classes of aliens not eligible for adjustment of status and it does not refer to discretionary considerations of factors that are favorable and/or unfavorable to the applicant. The Service did not use unauthorized employment and the fact that you overstayed your visa to determine statutory eligibility for adjustment of status. Instead, these factors were used in the discretionary analysis. Unauthorized employment and disregard for the immigration laws by overstaying one's visa are negative factors to be considered in the exercise of discretion especially if other negative considerations are present. *Matter of Khan*, 17 I&N Dec. 508 (BIA 1980).

The attorney also cites *Matter of Cavazos*, 17 I&N Dec. 215 (BIA 1980) in support of his claim that "immediate relatives" as defined in section 201(b) of the Act seeking to adjust status in the United States are entitled to preferential treatment. In the *Matter of Cavazos, supra*, the Board of Immigration Appeals stated what follows:

> *Where a* ***finding of preconceived intent was the only negative factor*** *cited by the immigration judge in denying the respondent's application for adjustment of status as the beneficiary of an approved immediate relative visa petition* ***AND no additional ad-***

> ***verse matters are apparent*** *in the record* ***AND where significant equities are presented*** *by the respondent's United States citizen wife and child, a grant of adjustment of status is warranted as a matter of discretion.* (Emphasis added)

The issue in that case was preconceived intent. Preconceived intent was not the issue in your case. In addition and as discussed in the Service denial, there are additional adverse matters in the record.

(vii) **"The decision disregards several positive factors"**: You attorney stated that many positive factors were overlooked in the decision, such as: your lengthy presence in the United States and your good moral character. He cited a memorandum written by an Immigration and Naturalization Service (a predecessor of this Service) Commissioner and dated November 27, 2000 but he failed to produce a copy of the said memorandum. The attorney refers also to *Matter of Francois*, 10 I&N Dec. 168, 170 (BIA 1963) which states that in determining whether an application for adjustment merits the favorable exercise of discretion one of the factors to be considered is applicant's good moral character for a reasonable period of time. The Act, as amended lists nine (9) classes of persons who are not of good moral character in section 101(f). You do not seem to fall within any of the nine listed classes, however, section 101(f) of the Act, as amended, states also as follows:

> *The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. [. . .]*

The Service acknowledges that the record contains no history of arrests nor criminal activity, however, as stated in the Service decision, the record reflects numerous unfavorable factors pertaining to your disregard of terms of your admission and your overall disregard of U.S. immigration laws. In the absence of other proof to the contrary, those unfavorable factors do not warrant a finding of good moral character. You failed to provide proof of your good moral character with the motion.

(viii) **"The decision is inconsistent with Service Precedent"**: Your attorney alleged that the Service decision is not consistent with the Service precedent. He purported that the Service "*routinely adjusted statuses of VWP overstays who marry U.S. citizens*". Your attorney stated further that "*on information and belief, USCIS Newark Field Office has adjudicated and adjusted many VWP overstays who have not only overstayed but also had final orders issued by ICE*". Each case is reviewed on its own merits. In this case, the Service has determined that you do not warrant a favorable exercise of discretion.

Title 8 of the Code of Federal Regulations, Section 103.5(a)(3) states that

> *Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration* ***AND*** *be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition* ***MUST****, when filed, also establish that the decision was incorrect based on evidence of record at the time of the initial decision.*

Title 8 of the Code of Federal Regulations, Section 103.5(a)(4) states that:

> *Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed. [. . .]*

Your adjustment of status application was denied by the Service based on discretion. You have failed to establish that the Service decision was based on an incorrect application of law or Service policy. Based on the foregoing, the motion to reconsider the denial of your adjustment of status filed on April 7, 2010 is hereby denied.

APPENDIX B

U.S. Department of Homeland Security
Citizenship and Immigration Services
Newark Field Office
970 Broad Street
Newark, NJ 07102

[SEAL OMITTED] **U.S. Citizenship and Immigration Services**

Heathcliffe John BRADLEY
[ADDRESS OMITTED]

File: A87 074 865
Date: [Nov. 1, 2010]

RE: Motion to reconsider filed on April 7, 2010.

See attached decision on the above referenced matter.

Sincerely,

/s/ KIMBERLY ZANOTTI
KIMBERLY ZANOTTI
Field Office Director

JMD / Regular mail

cc: Harry ASATRIAN, Esq.

www.dhs.gov

ATTACHMENT

Date:

File #: **A87 074 865**

Subject: Heathcliffe John BRADLEY

In Re: Motion to Reconsider Denial

Discussion:

Reference is made to the **Form I-290B, Notice of Appeal or Motion** (hereinafter referred to as the motion), filed on your behalf by your attorney, Harry ASATRIAN, on April 7, 2010 in connection with your Application to Register Permanent Residence or Adjust Status, (hereinafter referred to as your I-485)[1]. The basis of the motion is set forth in documents submitted in support. The fee receipt is dated April 7, 2010, which becomes the filing date for purposes of this decision. Your attorney filed this motion at the Newark Field Office. At the time of the filing, the following was submitted by your attorney:

(i) Form I-290(B),
(ii) A cover letter from the attorney of record,
(iii) A brief in support of the Motion dated April 2, 2010 signed by your attorney, and

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[1] You are the beneficiary of an approved Form I-130, Petition for Alien Relative (hereinafter referred to as I-130), in the immediate relative category as a spouse of a United States citizen. On or about December 11, 2007, you filed an Application to Register Permanent Residence or Adjust Status, Form I-485 (hereinafter referred to as your I-485) to seek adjustment to the status of lawful permanent resident based on the approved I-130. You I-485 was denied by the Service on March 3, 2010.

(iv) A copy of the Service decision dated March 3, 2010.

On April 22, 2010, the United States Court of Appeals for the Third Circuit rendered its decision regarding your Petition for Review filed with the court on or about October 14, 2008. *See Bradley v. Attorney General*, 603 F.3d 235 (3rd Cir. 2010). In its decision, the court found that:

> *We agree and hold that, although Bradley was once statutorily eligible under 8 U.S.C. § 1255(c)(4) for the adjustment he now seeks, he may not, after the expiration of his 90-day stay, adjust his status as a defense to removal. Bradley's VWP waiver squarely forecloses him from contesting his removal on this basis.*

The United States Court of Appeals for the Third Circuit denied your Petition for Review based on the finding that you are ineligible to contest your removal order[2] by filing for adjustment of status when such filing took place outside of your lawful 90-day stay[3].

---

[2] Your removal order under section 217 of the Immigration and Nationality Act was issued on October 8, 2008 by the United States Immigration and Customs Enforcement, Detention and Removal Operations (hereinafter referred to as ICE DRO).

[3] You last entered the United States on or about August 28, 1996 under the Visa Waiver Pilot Program (hereinafter referred to as the VWP), pursuant to Section 217 of the Act. It was your fifth entry under the VWP. At the time of your entry, you were authorized to remain in the United States for a period not to exceed 90 days.

In the light to the decision, you are found ineligible for adjustment of status. Based on the foregoing, the motion to reconsider the denial of your adjustment of status filed on April 7, 2010 is hereby denied.

No. 10-397

Supreme Court, U.S.
FILED
JAN 3 - 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HEATHCLIFFE JOHN BRADLEY,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

REPLY BRIEF 1

CONCLUSION 9

TABLE OF CITED AUTHORITIES

Page

Cases:

Bayo v. Napolitano,
593 F.3d 495 (7th Cir. 2010) 3

Bradley v. Attorney General,
603 F.3d 235 (3d Cir. 2010) 2, 4

Freeman v. Gonzales,
444 F.3d 1031(9th Cir. 2006) 5, 6, 8

Matter of Cervantes-Gonzalez, 22 I&N Dec.
560 (BIA 1999), *aff'd*, *Cervantes-Gonzalez v. INS*, 244 F.3d 1001 (9th Cir. 2001) 7

Momeni v. Chertoff,
521 F.3d 1094 (9th Cir. 2008) 5

Statutes:

8 U.S.C. § 1182(a)(9)(B)(i) 7

8 U.S.C. § 1182(a)(9)(B)(v) 7

8 U.S.C. § 1187(b) 1

8 U.S.C. § 1255(c)(2) 4

8 U.S.C. § 1255(c)(4) 3, 4

8 C.F.R. § 103.2(b)(15) 6

Cited Authorities

	Page
8 C.F.R. § 103.3(a)(1)(ii)	6
8 C.F.R. § 245.2(a)(5)	6
8 C.F.R. § 1003.1(b)(5)	6

REPLY BRIEF

Respondent's position in his opposition brief, that an immediate relative of an American citizen who overstays the terms of his admission to the United States under the Visa Waiver Program ("VWP") may file an application for adjustment of status but may not "contest removal" by seeking a simple review of such application before an Immigration Judge, is perplexing. In so arguing, Respondent seemingly departs from the holdings of the Third Circuit and other Courts of Appeals, which have held that a VWP entrant is "contesting removal" when he attempts to adjust his status any time after the 90-day period of authorized stay, elucidating the general uncertainty surrounding the issue of what actions constitute an impermissible "contest [of] . . . any action for removal." 8 U.S.C. § 1187(b). In conceding that a VWP entrant may file an adjustment of status application outside the 90-day period, Respondent fails to explain why simple review of the application by an Immigration Judge should constitute a defense to removal. Petitioner maintains that, possessing the right to file an adjustment of status application outside of the 90-day period, a VWP entrant should be entitled to simple procedural review and that this process should no more be considered a defense to removal than the application itself.

Owing to the significant confusion surrounding the appropriate procedure for the adjudication of adjustment applications filed by immediate relative VWP entrants who overstay and the fact that a substantial number of American citizens and their spouses are affected by the clear resolution of the issue, this Court should grant review.

1. The Respondent claims that there is no Circuit Court split and that there is no solid evidence that USCIS has inconsistently adjudicated the AOS applications of VWP entrants. However, at a closer look, the Circuit Courts of Appeals do indeed differ in dealing with this issue when addressing the procedural rights of AOS applicants. As a result, USCIS continues to inconsistently adjudicate these applications depending on the AOS applicant's residence, which establishes its jurisdiction. Consequently, due to this lack of uniformity in applying the federal laws and immigration policy, a fundamental principle espoused by Congress in enacting federal immigration laws, the varying Circuit Court decisions continue to negatively impact thousands of families across the United States.

2. In his opposition, Respondent states that no conflict is presented regarding Petitioner's *eligibility* for adjustment of status because "[t]he court of appeals did not opine on whether petitioner remains eligible for United States Citizenship and Immigration Services ("USCIS") to grant him adjustment as a matter of discretion." Opp. 14-15. Respondent's interpretation of the Third Circuit's holding is misconstrued. In fact, the Third Circuit in *Bradley v. Attorney General*, 603 F.3d 235 (3d Cir. 2010), quoting the Seventh Circuit, stated that,

> During the time when a nonimmigrant visitor is within the VWP's 90-day window, she may submit an adjustment-of-status application based on an immediate relative. *An application submitted at that time would not represent a challenge to removal.* After the

> visitor overstays her 90-day visit, however, the effect of the VWP waiver kicks in, preventing any objection to removal (except for asylum), including one based on adjustment of status.

Id. at 242 (citing *Bayo v. Napolitano*, 593 F.3d 495, 507 (7th Cir. 2010) (en banc) (emphasis added). The Court added that "[A]lthough [Petitioner] was once statutorily eligible under 8 U.S.C. § 1255(c)(4) for the adjustment he now seeks, he may not, after the expiration of his 90-day stay, adjust his status as a defense to removal." *Ibid.* Finally, the Court determined "that [Petitioner's] VWP waiver forecloses him from contesting his removal via a petition for adjustment of status." *Id.* at 242-3.

The language employed by the Third Circuit (and indeed by the other Courts of Appeals to address this issue) strongly suggests that the Court considers *any* adjustment application submitted after the expiration of the 90-day stay to constitute an impermissible challenge of removal. Nowhere did the Court imply that its usage of the phrase "defense to removal" was, as Respondent proposes, limited to Petitioner's "attempt to obtain judicial review of the [removal order] and to use adjustment as a means of avoiding removal." Opp. 12. Not one of the seven Courts of Appeals to have spoken on the issue of VWP waivers has suggested that a VWP entrant is eligible to receive an adjustment of status when an application has been filed after the expiration of the 90-day period, as Respondent concedes. Opp. 15. Further, USCIS has repeatedly flipped on the issue, occasionally denying Petitioner's

adjustment applications on discretionary grounds and at other times on the basis of ineligibility.[1]

Contrary to Respondent's assertions, Petitioner's eligibility to have his adjustment of status application adjudicated and reviewed is at issue in this case.

3. In asserting that "a VWP alien who is an immediate relative may seek adjustment of status *outside* removal proceedings," Opp. 10, Respondent unravels the reasoning of the Courts of Appeals. If Petitioner's application for adjustment of status constitutes an application for relief that is statutorily available and not a defense to removal, it follows that merely seeking review of a denial of an adjustment application before an Immigration Judge should similarly be considered a simple review and not a challenge to removal.

---

1. When USCIS reconsidered (notably, after the filing of this Petition for Writ of Certiorari) its prior denial of Petitioner's *second* adjustment application requesting *nunc pro tunc* adjudication, it first found Petitioner "ineligible for adjustment of status" based on the Third Circuit's decision in *Bradley*. 1 Nov. decision, Resp. App. 19a. (Petitioner's second AOS application was filed not as a relief from removal, as the Respondent would like this Court to believe, but a way to cure the procedural issues, which prevented his first AOS application to be decided on the merits.) Curiously, within three weeks, USCIS withdrew this decision *sua sponte* and issued an order denying reconsideration as a matter of discretion. 18 Nov. decision, Resp. App. 2a, 14a-15a. Even more confusing is the fact that Petitioner's application fails "as a matter of discretion" almost exclusively for factors consisting of and related to his unauthorized employment and overstaying the terms of his admission, while these factors are express statutory exceptions to his ineligibility for adjustment. *See* 8 U.S.C. § 1255(c)(2), (4).

Further, it remains illogical to consider judicial review of an adjustment application filed before a removal order is even issued to be an impermissible defense to removal simply because an application is filed outside the 90-day period. Certainly, an application filed after a removal order has been issued, as in *Momeni v. Chertoff*, 521 F.3d 1094 (9th Cir. 2008), can be construed as a defense to removal;however, where no efforts at removal have been made, no proactive measures to legitimize one's status can be considered a "defense" to removal. In drawing a line between adjustment applications filed before and after the 90-day mark, the Courts of Appeals appear to have considered any application filed after the 90-day period to constitute a "defense to removal." With Respondent's concession that a VWP entrant may seek an adjustment of status after the 90-day mark, any reasonable distinction between the treatment of such applications and applications filed before the 90-day mark disappears. Respondent offers no explanation as to why review before an Immigration Judge within the 90 days should not be considered "removal proceedings" but the same review process afterwards should be.

If Petitioner is indeed eligible to seek an adjustment of status after the 90-day period, the procedure should be akin to that adopted in *Freeman v. Gonzales*, 444 F.3d 1031, 1095 (9th Cir. 2006). In *Freeman*, the Ninth Circuit stated, "once [the applicant and her spouse] initiated the adjustment of status process by filing the necessary forms, her right to remain in the United States and to challenge any adverse decision became subject to procedural protections governing adjustment of status applications." *Id.* at 1034. According to the

Ninth Circuit, the procedural benefits include the applicant's right to renew his or her application if it has been denied, as Petitioner's was. *Id.* at 1035; 8 C.F.R. § 245.2(a)(5). If an adjustment application is renewed after removal proceedings have begun, the applicant is entitled to review before an Immigration Judge.[2] *Id.*

---

2. Respondent notes that a denial of an I-130 cannot be "appealed" to the Board of Immigration Appeals when the petition is deemed abandoned and is denied for that reason. Opp. 4; 8 C.F.R. § 103.2(b)(15), 103.3(a)(1)(ii), 1003.1(b)(5). Respondent does not mention, however, the confusion that led to the denial of the I-130 in Petitioner's case.

Petitioner filed a timely request to have his adjustment of status interview rescheduled and USCIS, after failing to notify Petitioner that his interview would not be rescheduled, denied his initial I-485 and I-130 without deciding it on the merits. Pet. App. 20a-23a. That initial I-485 was filed *prior to the order of removal* being issued against him by Immigration and Customs Enforcement. Had the case been decided on the merits, Petitioner would likely be a U.S. permanent resident at this point. At that point, USCIS informed Petitioner that he should depart from the United States or be subject to "removal proceedings", and informed Petitioner's American citizen spouse that she would be permitted to *appeal* the decision to the Board of Immigration Appeals ("BIA") within thirty (30) days. *Id.* at 20a. Petitioner's attorney, following the directions of USCIS, filed an appeal of the decision to deny the I-130 and I-485. The BIA denied this appeal for lack of jurisdiction pursuant to 8 C.F.R. § 103.2(b)(15), but found that the Field Office Director *erroneously* informed the petitioner (Cheryl Losee) that she had 30 days to appeal her decision to the BIA. The government's mistakes and inconsistencies in handling these matters only support the Ninth Circuit's approach in *Freeman* to afford procedural protections governing adjustment of status applications filed by immediate relatives of American citizens, who are VWP overstays.

In sum, the parties agree, in contrast to the Third Circuit's holding, that Petitioner, as an immediate relative of an American citizen, is eligible to file an application for adjustment of status even once he has fallen out of status. Petitioner maintains only that he should be entitled to the procedural protections that typically accompany the filing of an adjustment application, a process entirely distinct from any "removal proceedings" that may later be filed.

4. Respondent maintains that even if Petitioner is removed, he may secure lawful permanent resident status by seeking an immigrant visa and the appropriate waivers from abroad. Opp. 14 n .11. While this bare assertion is correct, Respondent fails to mention that Petitioner's removal will result in a ten year bar on his return, 8 U.S.C. 1182(a)(9)(B)(i), waivable only by the Attorney General on a showing of "extreme hardship" to the American citizen spouse. 8 U.S.C. § 1182(a)(9)(B)(v).

In immigration law, "extreme hardship" is "not a definable term of fixed and inflexible meaning, and the elements to establish extreme hardship are dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999), *aff'd*, *Cervantes-Gonzalez v. INS*, 244 F.3d 1001 (9th Cir. 2001). The standard for establishing "extreme hardship" is high; the factors to be considered include, but are not limited to:

> the presence of lawful permanent resident or United States citizen family ties to this country; the qualifying relative's family ties

> outside the United States; the condition in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties to such countries; the financial impact of departure from this country; and, finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

Id. at 566.

As the VWP countries are "favored," *Freeman v. Gonzales*, 444 F.3d 1031, 1035 (9th Cir. 2006), and predominantly Western, a VWP citizen is likely to have serious difficulty demonstrating "extreme hardship." In effect, therefore, the process of returning to the United States and acquiring lawful permanent resident status is hardly as simple and straightforward as Respondent suggests and is indeed improbable for Petitioner and for anyone similarly situated.

CONCLUSION

The petition should be granted.

Respectfully Submitted,

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